87-1697

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1987

STANLEY WILKINSON,
Petitioner,

vs.

CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Yakima Indian Tribe have the authority to control through comprehensive zoning the use of fee land within the borders of its reservation when that land has been alienated to reservation residents, including non-Indians, pursuant to the Allotment Acts, and when both the Yakimas and non-Indians have heretofore treated the land in question as "open" to all and subject to Yakima County's zoning authority?

2. May Congress, consistent with the Fifth Amendment to the United States Constitution, sanction the exercise of Indian legislative power over non-Indians residing on fee-owned land within a reservation when those non-Indians are disenfranchised on the basis of ancestry and cultural affiliation from participation in Tribal government?

3. Does a federal court of appeals proceed properly under *Montana v. United States*, 450 U.S. 544 (1981) and Fed. R. Civ. P. 52(a) when it independently determines whether a tribe may exercise authority over the fee-owned land of reservation residents despite district court findings that the factual predicates for the existence of tribal authority are absent?[1]

LIST OF PARTIES

The parties to the proceeding below were: petitioner Stanley Wilkinson, a reservation resident landowner; Jim Gatliff and Dick Keller, who at the time of suit were prospective purchasers of a portion of Stanley Wilkinson's reservation land and were aligned as defendants-appellees below; the County of Yakima and its three County Commissioners, Jim Whiteside, Graham Tollefson and Charles Klarich, defendants-appellees below; Richard F. Anderwald, the Director of Yakima County's Planning Department, defendant-appellee below; and respondent Confederated Tribes and Bands of the Yakima Indian Nation.

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[1]Petitioner Wilkinson reserves the right to argue Question 3 if certiorari is granted on Question 1 above, but does not offer Question 3 as a reason for this Court's grant of certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STANLEY WILKINSON, *Petitioner,*

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Stanley Wilkinson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 21, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 828 F.2d 529 (9th Cir. 1987), and is reprinted in the Appendix to this petition at page 3a.

The opinions of the District Court in *Whiteside I* and *Whiteside II* are reported, respectively, at 617 F. Supp. 735 and 617 F. Supp. 750, and are reprinted in the Appendix to this petition at pages 108a and 33a.

The District Court's orally delivered Findings Of Fact And Conclusions Of Law in *Whiteside II* are unreported, but are reprinted in the Appendix to this Petition at page 80a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a judgment and order reversing the District Court's decision in

Whiteside II. and remanding that case to the District Court, on September 21, 1987. 3a.

On January 13, 1988, the Court of Appeals for the Ninth Circuit entered an order denying the County of Yakima's timely filed petition for rehearing. 1a.

Petitioner Wilkinson invokes this Court's jurisdiction to review the Ninth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* 194a.

Fifth Amendment To The United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Treaty With The Yakimas, 12 Stat. 951. 172a.

STATEMENT OF THE CASE

The Yakima Indian Nation, a federally recognized Indian tribe, and Yakima County, a political subdivision of the State of Washington, each contend it has the exclusive right to zone about 235,000 acres that is within the boundaries of the Yakima Indian Reservation but owned in fee by non-Indians or Indians.

The Yakima Reservation was established by an 1855 treaty under which various tribes were considered "one nation" and a specified area in the Territory of Washington was set aside for their exclusive use. 36a-37a. The reservation now encompasses about 1.3 million acres, the vast majority of which is in Yakima County. 37a. In 1970, the Yakimas first adopted a zoning ordinance to control the use of all reservation land. 40a.

Pursuant to the treaty, some of the reservation in the 1870s

and 1880s was divided into parcels and allotted to tribal members. Land within the reservation did not pass into non-Indian ownership, however, until after Congress's enactment of the Allotment Act in 1887. As the result of the allotment process about 20% of the reservation is in fee ownership and the remainder is owned by the Tribe or in trust by the United States. 37a.

Since 1954 the reservation has been divided into two areas. The Tribe limits access by non-members to the approximately 800,000 acres of uninhabited timberlands constituting the "closed area." About 25,000 acres of the closed area is in fee ownership. 37a-38a. The "open area," to which there is no limitation of access, consists of approximately 500,000 acres of primarily agricultural land. Almost half of this land is held in fee. 40a. About 20,000 non-Indians and 5,000 Indians live in the open area, which includes three incorporated cities: Toppenish, with a population of 6,575; Wapato, with a population of 3,310; and Harrah, with a population of 345. 84a-85a. Yakima County has built and maintains 487 miles of roads in the open area, and provides schools for Indians and non-Indians residing there. 87a-88a.

Yakima County adopted its first land use planning ordinance in 1946; its first formal zoning code in 1965; and its first comprehensive plan in 1972. 43a. For the last thirty-five years, the County has exercised zoning jurisdiction over all fee land within the open area. 85a. On at least one occasion the Tribe submitted a long plat application for land within the reservation to Yakima County for processing. *See* Transcript of Proceedings at 455.

In addition to zoning, Yakima County has ordinances and procedures to comply with the State of Washington's Shoreline Management Act and applies these provisions to Ahtanum Creek and the Yakima River within the reservation. Yakima County also participates in the Federal Flood Hazards Program, which it applies to portions of the reservation. 87a-88a.

Petitioner Wilkinson is a non-Indian who owns and lives on fee land within the reservation. Wilkinson's land is approximately three-quarters of a mile south of the reservation's northern boundary, overlooking the Yakima Municipal Airport and about three miles from the City of Yakima. In 1982 Wilkinson contracted to sell about 40 of the 100 acres he

owned to Gatliff and Keller. 34a. These 40 acres were vacant sagebrush land. In 1983 Wilkinson applied for and obtained Yakima County's preliminary approval to subdivide a portion of this 40 acres. 47a-48a; Transcript of Proceedings at 520-522.

The Tribe, whose zoning ordinance would not have allowed Wilkinson's plan, filed a timely appeal from this decision to the Yakima County Board of Commissioners, and argued that Yakima County did not have jurisdiction. The Board of County Commissioners asserted jurisdiction and determined that Wilkinson could proceed. 49a-50a.

The Yakima Tribe then brought suit in the United States District Court pursuant to 28 U.S.C. §§ 1343 and 1362 seeking injunctive and declaratory relief against Yakima County, the Yakima County Commissioners, the Yakima County Planner, Wilkinson, and Gatliff and Keller. Among other relief, the Tribe sought "a declaratory judgment declaring the rights of the parties regarding land-use and entry regulations within the exterior boundaries of the Yakima Indian Reservation . . ." Complaint at ¶ 5.1.3. The Tribe also sought damages under 28 U.S.C. § 1983 and asserted a pendent claim under Washington's Environmental Policy Act.

The District Court dismissed all of the Tribe's claims with prejudice, ruling that the Yakima Indian Tribe "is without the authority to exercise regulatory jurisdiction over Wilkinson's 'Open Area' fee land." 67a (*Whiteside II*). In so ruling, the trial court found explicitly that: the Wilkinson project did not threaten a food source of the Tribe nor threaten its economic security; the County's regulation of the Wilkinson property would not significantly infringe on the religious or spiritual values of the Yakimas; the County's exercise of land use jurisdiction over the property did not threaten the land and natural resources of the Tribe; and the County's regulation of Wilkinson's fee land would neither diminish the Yakima Tribe's political integrity nor its ability to exercise regulatory jurisdiction over trust lands. 53a-54a.

Whiteside II was one of two companion cases addressing the extent of the Tribe's power to zone reservation land. *Whiteside I* concerned the Tribe's power to zone reservation land in the "closed area." It held that the Tribe had exclusive jurisdiction over that matter. 108a.

These cases were consolidated on appeal before the Ninth Circuit, which exercised its jurisdiction under 28 U.S.C. § 1291 and reversed the decision in the open area case (*Whiteside II*), and affirmed the ruling in the closed area case (*Whiteside I*). In reversing *Whiteside II*, the Court relied upon this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). It held that "If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do." 24a. It remanded *Whiteside II* for findings on "whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-Indians in the open area." 31a.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision Fails To Give Effect To Congress's Divestiture Of Tribal Power Over Nonmembers, And Creates Significant Uncertainty On An Important Question of Federal Law.

The Ninth Circuit's decision recognizes in the Tribe the inherent, sovereign power to control through comprehensive zoning the use of fee land within the borders of its reservation, even though much of that land is owned and occupied by non-Indians pursuant to the Allotment Acts, and is located in an area of the reservation that both Indians and non-Indians have heretofore treated as "open" to all and subject to Yakima County's zoning authority. In so ruling, the Ninth Circuit misapplied this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), ignored Congress's intent, and instituted an unworkable scheme of concurrent Indian-State jurisdiction that creates uncertainty on an important question of federal law. The Ninth Circuit's decision will have widespread, recurrent implications for the western states and their non-Indian

citizens, and merits this Court's review.*

A. The Ninth Circuit Failed To Give Effect To Congress's Limitation Of Tribal Authority Over Nonmembers.

In a series of decisions culminating in *Montana v. United States*, 450 U.S. 544 (1981), this Court has clarified that the sovereign power of Indian tribes stands on a significantly different footing than that of either the federal government or the states. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), this Court emphasized that upon their incorporation into the United States, the tribes came "under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *See also* F. Cohen, *Handbook Of Federal Indian Law*, 122 (1942). In *United States v. Wheeler*, 435 U.S. 313, 323 (1978), this Court, referring to tribal power as "of a unique and limited character," stated that Indian tribes possess only "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

This Court's decisions clarify as well that tribal power retains its limited character when juxtaposed with that of a State:

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two.

Oliphant, supra, 435 U.S. at 211, *quoting United States v. Kagama*, 118 U.S. 375, 279 (1886).

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*The Ninth Circuit's decision is not the first in which that Court has viewed *Montana v. United States* as difficult of application. *See, e.g., Namen v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (Rehnquist & White, JJ., dissenting).

Because it is "necessarily inconsistent" with the "dependent status" of Indian tribes for them to extend their authority beyond what is essential for control of internal tribal matters, *Wheeler, supra*, 435 U.S. at 326, this Court has held that Congress has divested the tribes of much of their power to control "the relations between an Indian tribe and nonmembers of the tribe . . ." *Id.*, 435 U.S. at 326.

The potential reach of tribal power explains Congress's decision. Tribal authority is not subject to Constitutional constraint. *Talton v. Mayes*, 163 U.S. 376 (1896). The process legally due one dealing with a tribe is derived from statute, and enforcement of that statute by all avenues save habeas corpus is solely a matter for the civilly immune tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Moreover, the fundamental democratic safeguard of electoral accountability is denied those non-Indians subject to Indian legislative power. It should thus necessarily follow that

> The tribe's authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "in this Nation each sovereign governs only with the consent of the governed." Nevada v. Hall, 440 U.S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 172-73 (1982) (Stevens, J., dissenting).

In *Montana v. United States*, 450 U.S. 544 (1981), this Court employed the principles inherent in the foregoing authority to determine that the Crow Tribe was precluded from regulating the hunting and fishing of non-Indians conducted on lands within reservation borders that were no longer owned by the Tribe nor held in trust for it by the United States. The Court emphasized that its holding not only reflected its recent decisions in *Oliphant* and *Wheeler*, but also represented a further instance of this Court's recognition—consistent since "the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within

their limits except themselves'." *Montana v. United States*, 450 U.S. at 565, *quoting Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 147 (1810).

In reaching its conclusion, this Court stated:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, supra, 450 U.S. at 565-66.

The Court stressed that the extent of Indian power, whether derived from treaty or based upon notions of retained sovereignty, cannot be divorced from historical fact. A court must assess it "in light of the subsequent alienation of those lands" over which a tribe purports to exercise regulatory power, and with reference to whether the tribe has "traditionally accomodated itself" to the state's authority in the now contested area. *Id.*, 450 U.S. at 561 and 566.

In *Montana v. United States*, the nature and derivation of land ownership was essential to the Court's decision regarding the extent of the Crow Tribe's power.[1] The fee land in that case, as in this, had been alienated pursuant to the Allotment Acts, through which Congress had attempted to achieve a policy of assimilation of Indians into the fabric of American society by the " 'gradual extinction of Indian reservations and Indian titles.' " *Id.*, 450 U.S. at 599 n.9, *quoting Draper v. United*

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[1] *Montana v. United States* is not unique in this aspect. This Court has emphasized repeatedly that the character of land tenure should have enduring legal implications for the exercise of tribal and state regulatory authority. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) (distinguishing *Montana v. United States* on the basis that it "concerned lands located within the reservation but *not* owned by the Tribe or its members"). *See also Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation*, 439 U.S. 463, 502 (1979).

States, 164 U.S. 240, 246 (1896). There was "no suggestion" in the legislative history of these acts "that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority." *Id.* Further, the Crow Tribe had, prior to the instant dispute, "traditionally accommodated itself" to the State's exercise of regulatory authority over the land. Tribal jurisdiction over that land, therefore, was foreclosed. *Id.*, 450 U.S. at 566-67.

The Ninth Circuit's decision warrants review because it seriously distorts the foregoing authority:

(1) The decision asserts that the Yakimas should have "comprehensive" control of fee lands the Tribe no longer owns, and which the district court found had been subject to Yakima County's exclusive zoning jurisdiction for the last thirty-five years. It thus effects a *political* choice to restore the Yakima Tribe to full sovereign status, with territorial powers over nonmembers. The Ninth Circuit's decision is especially troublesome because it was rendered in the face of undisputed property interests, a consistent course of Tribal treatment of the relevant portion of its reservation as "open" and subject to County regulation, and district court factual findings that Yakima County's exercise of regulatory authority over the land in question posed no threat to the economic, social or political integrity of the Tribe. Under this Court's decisions, all of these factors should serve to mark the practical and legally compelling boundaries of Indian power, yet none was given the requisite respect below.

(2) The decision fails to recognize the necessary implications of the Allotment Acts. It concludes that the Tribe retains as a matter of its inherent, sovereign power the authority to control the use of non-Indian fee land that this Court has stated passed out of the Tribe's control pursuant to Congressional enactment. *Cf. Montana v. United States*, *supra*, 450 U.S. at 599 & n.9.[1]

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[1]Even to the limited extent that the Treaty With The Yakimas, 12 Stat. 951, 172a, contemplates the subject, it envisions both allotments and that the Yakimas would not interfere with the property rights of non-Indians. *See Id.*, Art. VI (allotments) & Art. VIII (committing the Yakimas to refrain from taking or injuring non-Indian property).

(3) By recognizing simultaneously (a) that the Yakimas hold their powers solely at the pleasure of Congress, and (b) that they retain a sovereign power to control land owned in fee by non-Indian reservation residents, the Ninth Circuit necessarily found implicit Congressional approval of the Tribe's exercise of popularly unchecked governmental authority over citizens who relied on federal law to obtain the property upon which they make their homes. As a practical matter, this decision allows for circumvention of the Fifth Amendment's guarantees. It constitutes judicial recognition of a purported Congressional policy to sanction an unaccountable exercise of power over United States citizens who live within the borders of this country yet are disenfranchised based upon ancestry and cultural affiliation. This determination is especially egregious because it involves land use planning. This Court has consistently noted the significant role the political process plays in validating governmental land use controls. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 389 & 393 (1926).

B. The Ninth Circuit's Decision Is More Than Mere Error; It Works To Achieve Uncertainty On A Matter Of Great Significance To The Western States And Their Citizens.

On the Yakima reservation alone, there are approximately 235,000 acres of fee land owned by non-Indians who constitute approximately 80% of the population of the "open area." Similar conditions persist elsewhere in Washington, and undoubtedly throughout the West. *See, e.g., Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 174 (1977) (noting that the Puyallup Indians had alienated in fee "all but 22 acres of their 18,000-acre reservation"); *Oliphant, supra*, 435 U.S. at 193 n.1 (63% of the 7,276 acres of the Port Madison Indian Reservation is owned in fee by non-Indians).[3]

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[3] Non-Indian residents on reservations, and non-Indian land within reservations, are common features of Indian reservations. Within the State of Washington, 77,545 non-Indians and 12,347 Indians reside on 22 Indian reservations. U.S. Department of Commerce, *General Population Characteristics, United States Summary* (1980). The land in either non-Indian or individual Indian fee ownership constitutes 60% of the 4215 acres of the Chehalis Reservation; 32% of the 189,061 acres of the Quinault Reservation; 80% of the 4987 acres of the Skokomish Reservation; 44% of the 1496 acres of the Squaxin Reservation; and 50% of the 7063 acres of the Swinomish Reservation. U.S. Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* (1974).

The Ninth Circuit's decision has imposed on all such land an unworkable regime of concurrent Tribe-State jurisdiction. Whether Tribal or State zoning is to take precedence given a conflict apparently must await a balancing of the State and Tribal interests presented. 31a.

Zoning, however, is not suitable for concurrent jurisdiction. Zoning regulations will frequently directly conflict, requiring deference to one or the other of the zoning authorities. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) ("concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation").

By failing to subscribe to a test of power turning on land-tenure classifications derived from congressional intent, the Ninth Circuit unnecessarily created the potential for frequent, case-by-case jurisidictional zoning squabbles.* *See, e.g.*, 29a (referring to the Tribe's reasons "for regulating the open area and in particular the Wilkinson property"). Even when merely extrapolated from petitioner's property to the rest of the fee-owned 235,000 acres of the "open area," this decision is troublesome. Indeed, it generates substantial uncertainty for all concerned—for non-Indian reservation residents who cannot secure uniformity of regulation through the electoral process; for Yakima County, which wishes not only to service the land within its borders, but also to regulate its growth for the common weal; and for the Yakimas, who must anticipate a litigated struggle on each occasion they wish to exercise their power. When the court's decision is extended to the rest of the western states within its jurisdictional embrace, its significance is unquestionable.

In addition, the Ninth Circuit's decision obscures the application of *Montana v. United States*. The Ninth Circuit provides no insight into how the courts in this Circuit are now to apply that decision. In this case, the District Court found explicitly that Yakima County's exercise of zoning authority over non-Indian fee land did not pose a threat to the Tribe's political integrity, economic security or health and welfare.

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*In essence, the Ninth Circuit has recreated the type of unmanageable scheme of dual authority that this Court struck down in *Montana v. United States*, *supra*. *See Id.*, 604 F.2d 1162 (9th Cir. 1979).

53a-55a. In its oral decision the court stated that there was "no evidence whatsoever" presented indicating Yakima County's exercise of regulatory authority would interfere with the Tribe's political, economic or social interests. 99a. The Court of Appeals stated that it was bound to review such findings under the clearly erroneous test of Fed. R. Civ. P. 52(a). 25a. yet reversed the District Court's determination that the Tribe lacked authority. It did so because it was "unwilling" to uphold a determination that the Tribe did not have the power to regulate comprehensively the use of non-Indian fee land within the reservation. 24a.

This resolution begs the question of the ultimate source of the Ninth Circuit's decision. It appears to be an overtly political determination, and as such invites judicial recourse to such improper considerations in similar disputes.[*] This poses an additional, unnecessary uncertainty in an already complex, important area of federal law.

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[*] The District Court noted but refrained from relying on such considerations: "In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my finding that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members." 96a. "I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine." 98a.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiffs-Appellees, vs. JIM WHITESIDE, et al., Defendants, and PHILIP BRENDALE, Defendant-Appellant.	Nos. 85-4316 85-4433 85-4383 D.C. Nos. C-83-724-JLQ C-83-604-JLQ ORDER SUPPLEMENTING RECORD AND DENYING PETITION FOR REHEARING
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiffs-Appellants, vs. COUNTY OF YAKIMA, et al., Defendants-Appellees.	

BEFORE: SKOPIL, FLETCHER, and POOLE, Circuit Judges

Request of County of Yakima to supplement its petition for rehearing is GRANTED. The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CONFEDERATED TRIBES AND
BANDS OF the YAKIMA
INDIAN NATION, Plaintiffs-Appellees,

v.

Jim WHITESIDE, et al., Defendants,

and

Philip Brendale, Defendant-Appellant.

CONFEDERATED TRIBES AND
BANDS OF the YAKIMA
INDIAN NATION, Plaintiffs-Appellants,

v.

COUNTY OF YAKIMA, et al.,
Defendants-Appellees.

Nos. 85-4316, 85-4433 and 85-4383

United States Court of Appeals
Ninth Circuit.

Argued and Submitted Nov. 6, 1986.
Decided Sept. 21, 1987.

Appeal from the United States District Court for the Eastern District of Washington.

Before SKOPIL, FLETCHER and POOLE, Circuit Judges.

FLETCHER, Circuit Judge:

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) brought these two cases in federal court seeking a declaratory judgment and an injunction barring the defendants from making or permitting any land use within the Yakima Indian Reservation that is contrary to the Amended Zoning Regulations of the Yakima Nation. In Whiteside I, 617 F. Supp. 735, the district court found that Yakima Nation's interests in zoning fee land owned by non-members within the closed area of the reservation

were infringed by the application of Yakima County's (the County) zoning ordinances and therefore precluded county zoning. By contrast, in Whiteside II, 617 F. Supp. 750, the district court found that Yakima Nation did not have the authority to zone non-Indian fee land in the "open" area, and permitted application of the County's ordinances.

Defendant Philip Brendale, record owner of fee land in the closed area at issue in Whiteside I, appeals on the ground that Yakima Nation has no interest in regulating fee land owned by non-members. We affirm the judgment in Whiteside I. Yakima Nation appeals the judgment in Whiteside II and argues that the tribe has the authority to zone non-Indian fee land in the open area, and further that the federal and tribal interests outweigh the County's interest in regulating the land. We agree that

Yakima Nation possesses the requisite authority to zone, and remand to the district court to balance the federal, tribal and County's interests.

FACTS

I. Whiteside I

The Yakima Indian Reservation is composed of 1.3 million acres of land. Of this amount, about 807,000 acres, including 740,000 acres in Yakima County, fall within the reservation's closed area. Only 25,000 acres of the closed area within Yakima County are held in fee. The closed area is restricted to members of Yakima Nation and permittees in order to protect and enhance its natural resources, natural foods, medicines, game wildlife, and environment. Much of the closed area is forested with timber, a mainstay of Yakima Nation's

economic operations. The closed area is relatively undeveloped. There are no permanent residents in the part of the closed area located in Yakima County.

In 1970, Yakima Nation adopted its first zoning ordinance. The ordinance was made more comprehensive in 1972. The tribal code provides for five categories of districts: agricultural, residential, commercial, industrial and restricted. It also establishes requirements for building permits, authorizes the creation of Planned Development Districts, and provides for special use permits. Under the tribal code, only the following uses are permitted in the closed area:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members;

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

Yakima County has regulated land use since 1946, but passed its first comprehensive zoning ordinance in 1965. Within the reservation, the County regulates fee land but not trust land. The County zoned the closed area as "forest watershed," which permits such structures as single

family dwellings, commercial campgrounds, overnight lodging facilities with less than sixteen units, restaurants, bars, and general stores. The forest-watershed district is designed to conserve land and water while accommodating pressures for residential, recreational and commercial uses. The County has other land-use regulations applicable to fee land. These include the 1974 subdivision ordinance, which imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites, the Yakima County Shoreline Master Program and a federal flood insurance program.

The Brendale property consists of 160 acres of fee land within the forested portion of the closed area. The nearest county road is over twenty miles away. In January, 1982, Brendale filed four contiguous short plat applications with

the Yakima County Planning Department, which issued a Declaration of Non-Significance and later approved the applications. In April, 1983, he submitted a long plat application to divide one of his new twenty-acre parcels into ten two-acre lots. He intended the lots to be sold as summer cabin or trailer sites. The County Planning Department issued a Declaration of Non-Significance, which Yakima Nation appealed on the grounds that the county did not have authority to regulate the Brendale land and that the development would significantly affect the environment. The Commissioners found that the County had jurisdiction, but that an Environmental Impact Statement (EIS) should be prepared. Yakima Nation brought this suit as the County began work on the EIS.

II. Whiteside II

Approximately half of the land in the open area is held in fee. Most of the open area is rangeland, and land used for agriculture, and residential and commercial developments. Agriculture and related activities are the primary source of income. Non-members are permitted to move freely in this area. The County maintains an extensive road system of nearly five hundred miles throughout the open area. Most of the fee land lies within the three incorporated towns of Toppenish, Wapato and Harrah. The rest is scattered throughout the reservation in a checkerboard pattern, some clustered in particular areas. Roughly eighty percent of the population of the open area, including that of the incorporated towns, are non-members of Yakima Nation. It appears that neither Yakima Nation nor the County regulates land use within the incorporated towns.

Under Yakima Nation's Amended Zoning Ordinance, the Wilkinson property is zoned "agricultural." This designation indicates that the "principal use of the land is for agricultural purposes." All buildings are prohibited except agriculture related buildings, agriculture product processing plants, buildings on public parks and playgrounds and single family dwellings. The minimum lot size is five acres. This is the only type of agricultural district under the Yakima Nation's Code.

The County's agricultural zones include three types: "exclusive agricultural," "general agricultural," and "general rural." Under "exclusive agricultural" lot size minimums are forty acres, under "general agricultural," twenty acres, and under "general rural," one acre. The County has designated the Wilkinson property as "general rural."

This zoning is intended to "'provide protection for the county's unique resources and land base,' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" District court opinion in Whiteside II, at 753. The number and variety of uses possible under special use permits is considerably greater than those allowed within exclusive and general agricultural districts. As noted above, the County has other extensive land-use regulations.

The Wilkinson property is a forty-acre tract of fee land about three-quarters of a mile south of the reservation's northern boundary. The City of Yakima is three miles to the north of the tract. The property is vacant sagebrush land.

In September, 1983, Wilkinson applied to the Yakima County Planning Department

to subdivide thirty-two acres into twenty lots ranging in size from 1.1 to 4.5 acres, each lot to be used for a single family residence. Wilkinson submitted an environmental checklist from which the Planning Department initially determined that an EIS was required. However, the Planning Department issued a Declaration of Non-Significance after Wilkinson agreed to modify his proposal. Yakima Nation appealed, arguing that the County was without authority to regulate and that the proposal would significantly affect the environment. The Commissioners affirmed and Yakima Nation filed suit in federal court.

DISCUSSION

I. Public Law 280

[1] Brendale and the County maintain that Washington's enactment of Wash.Rev. Code §37.12.010, adopted pursuant to

Pub.L. No. 280, 67 Stat. 588 (1953), as amended, 18 U.S. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III 1985) (Public Law 280), divested Yakima Nation of authority to regulate the activities of non-Indians on fee-owned land within reservation boundaries. This argument lacks merit. Public Law 280 grants state courts jurisdiction over civil litigation involving reservation Indians, but does not intrude upon tribal regulatory authority. California v. Cabazon Band of Mission Indians, ___ U.S. ___, 107 S.Ct. 1083, 1087-88, 94 L.Ed.2d 244 (1987). Because zoning is clearly regulatory, Public Law 280 does not affect Yakima Nation's authority to zone.

II. Preemption and Infringement

[2] Yakima Nation's claim, in essence, is that the state, acting through the County, is barred from

imposing its zoning ordinances to control non-member fee land on the reservation. States may impose laws on non-members engaged in activities on Indian reservations unless a given law is preempted by federal law or unless it "'unlawfully infringes on the right of reservation Indians to self-government.'" United States v. Anderson, 736 F.2d 1358, 1363 (9th Cir. 1984) (quoting Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir.), cert. denied, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981)). We must balance the interests of federal, tribal and state authorities to determine whether a state is precluded from regulating particular conduct of non-members on Indian reservations. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980); see also Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1391 (9th Cir. 1987).

1. Federal Preemption

Yakima Nation asserts that federal law preempts the application of state law. It lists a number of federal statutes that Yakima Nation maintains embody federal policy to provide for tribal self-government and the protection of reservation resources. Broad preemptive effect is accorded not only specific federal statutes, but the policies animating them. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982). We therefore construe preemption generously, and may find preemption even if Congress has not expressly stated an intention to preempt state law. Id.

Yakima Nation is correct that many of these statutes, see, e.g., Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq. (1982); Indian Child Welfare Act

of 1978, 25 U.S.C. § 1901 et seq. (1982); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. (1982), embody and advance a broad federal policy of recognizing Indian sovereignty and encouraging tribal self-government. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 n. 17, 76 L.Ed.2d 611 (1983). Others facilitate and encourage tribal management of Indian resources. Of particular note, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (1982 and Supp. III 1985), authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving trust land, including zoning, from the federal government to the tribe. 25 C.F.R. § 271.32 (1986). These statutes may not establish the "comprehensive and detailed federal

involvement in or regulation of the particular tribal activity," Chemehuevi Indian Tribe v. California State Bd. of Equalization, 800 F.2d 1446, 1448 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2184, 95 L.Ed.2d 840 (1987), necessary to find federal preemption, that existed in Bracker, 448 U.S. at 145-48, 100 S.Ct. at 2584-86, or in Segundo, 813 F.2d at 1392-94. At a minimum, however, they embody a federal policy that informs our inquiry concerning the reach of Indian sovereignty.

2. Tribal Authority

Before we may consider Yakima Nation's interest in regulating non-member fee land, we must determine whether it possesses the requisite regulatory authority. The Supreme Court has long recognized the inherent "attributes of sovereignty [in Indian tribes] over both

their members and their territory." Iowa Mut. Ins. Co. v. LaPlante, ___ U.S. ___, 197 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987) (quoting United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855), in which Yakima Nation and the United States agreed that Yakima Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws."

Tribal authority extends to regulation over the activities of non-Indians on reservation lands. Iowa Mutual, 107 S.Ct. at 978. Such authority, however, is more limited than that over Indians. The Supreme Court has, without apparent consistency, applied two tests to deter-

mine the limit on tribal authority over the conduct of non-Indians. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court held that tribal sovereignty is divested only when its exercise is inconsistent with overriding federal interests. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Id. at 154, 100 S.Ct. at 2081. Nine months later, the Supreme Court in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), reiterated language disregarded by Colville, that Indian tribes have been implicitly divested of their sovereignty to regulate relations between the tribes and nonmembers by virtue of their dependent status. Id. at 563-64 101 S.Ct. at 1257-58 (citing

United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). The Court held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Id. at 450 U.S. at 564, 101 S. Ct. at 1258.

The Montana Court identified two exceptions to the limitation on tribal regulatory authority over non-members. The exceptions stem from inherent tribal authority over the tribe's members and to manage its territory as well as the power to exclude non-members from its reservation. Anderson, 736 F.2d at 1364; Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984). A tribe retains

authority to regulate "the activities of nonmembers who enter consensual relationship with the tribe of its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 450 U.S. at 565, 100 S.Ct. at 1258. A tribe also retains inherent regulatory authority over the conduct of non-Indians on fee land when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566, 100 S.Ct. at 1258 (the "tribal interest" test).

Yakima Nation asserts that we should apply the Colville test and hold that it has authority to zone non-Indian fee land under that test. Because we conclude that Yakima Nation has authority under the more stringent tribal-interest test employed in Montana, we need not determine whether the Colville analysis is

appropriate to determine tribal authority over non-Indians.[1]

We recently held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands." Segundo, 813 F.2d at 1393 (holding that a city could not apply its rent control ordinance in conflict with tribal ordinance to non-Indians on reservation trust land). Zoning, in particular, traditionally has

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1. Most of our cases have applied the Montana test, without referring to the conflicting language in Colville, to determine whether a tribe has the power to regulate non-Indians within reservation boundaries. See, e.g., United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S.Ct. 392, 74 L.Ed.2d 277 (1982). We did, however, apply both tests in Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982).

been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens. See Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, 670 F.2d 900, 903 (10th Cir. 1982); see generally Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). By enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation.[2] Tribal zoning is

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2. The Yakima Nation's Code sets out its purpose:

> The controls set forth in this ordinance are deemed necessary in order to encourage the most appropriate use of the land; to protect the social and economic stability of residential, agricultural, commercial, industrial, forest, reserved and other areas within the reservation,

(continued)

particularly important because of the unique relationship of Indians to their lands. Comment, Jurisdiction to Zone Indian Reservations, 53 Wash. L.Rev. 677, 680 (1978).

Further, a major goal of zoning is the "systematic and coordinated utilization of land" in a particular area. N. Williams, American Land Planning Law, § 1.06 (1974), cited in Comment, 53 Wash.L.Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses

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and to assure the orderly development of such large areas; and to obviate the menace to the public safety resulting from the improper location of buildings and the uses thereof, and the establishment of land uses along primary highways in such a manner as to cause interference with existing and proposed traffic movement on said highways; and to otherwise promote the public health, safety, morale and general welfare in accordance with the rights reserved by the Yakima Indian Nation.

in a desirable pattern. Id. at § 1.08, cited in Comment, 53 Wash.L.Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.

3. Balance of Interests

Having concluded that Yakima Nation has the authority to zone non-Indian fee land within the reservation boundaries, we must consider whether the interests of

Yakima Nation, as shaped by federal policy, outweigh those of the County. We review the district court's findings of fact, including its balancing of the interests, under a clearly erroneous standard.

A. Whiteside I

In addition to its general interest in asserting political authority -- an interest that, as noted above, federal policy seeks to advance -- Yakima Nation has a significant interest in zoning the closed area of the reservation. To protect grazing, forest and wildlife resources, Yakima Nation restricted the closed area to its members and permittees in 1954 and the Bureau of Indian Affairs restricted use of federally maintained roads in the closed area in 1972. The closed area is relatively undeveloped, with no permanent residences in the

Yakima County portion of the area, and residences in other portions predate the zoning ordinance. The closed area, which is about two-thirds forested, provides substantial economic support to the tribe through timber operations, and supplies many Yakima Nation members with a food supply. Its religious and spiritual value also motivates the Yakima Nation's protection of the closed area from development.

The district court found that the Brendale development would cause disruption of Yakima Nation's interests. Construction and use of roads and cabins would cause soil disturbance and erosion, deterioration of ambient air quality, change of water absorption rates and drainage patterns, destruction of some trees and natural vegetation, likely alteration of migration patterns of deer and elk, increased noise levels and

thicker population density. Development would necessitate new police and fire services.

The County's zoning classification, if applied, would permit the construction of such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than six units, restaurants, and bars in the restricted area. The imminence of such construction is suggested by the fact that Brendale, himself, has stated he intends to build other developments on land adjacent to the property which is the subject of this suit. The district court's recognition of Yakima Nation's concern with maintaining the character of the closed area indicates that the court properly focused on Yakima Nation's

interest in regulating the entire closed area, including the Brendale property.[3]

By contrast, Brendale has not identified any interest the County has in regulating the closed area. The district court noted that the only interest asserted by the County was a general interest in providing regulatory functions to its taxpaying citizens. Further, Brendale has not argued that the Yakima Nation's regulation of the closed area

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3. Brendale points out that Yakima Nation constructed a permanent structure of twelve dormitory cabins and two larger buildings in the closed area. Even if Brendale's development would have no greater impact on the closed area than the Yakima Nation's structure, a question the district court never considered, we believe the proper analysis addresses the multiplied burden of potential additional development that could occur if the Yakima Nation zoning ordinance were revoked.

has an effect outside the boundaries of the reservation.[4]

We conclude that the district court properly found that the County is precluded from zoning fee land within the closed area because the County's interest in imposing its regulation is outweighed by the significant interests of Yakima Nation.

B. Whiteside II

Yakima Nation has alleged a number of justifications for regulating the open area and in particular the Wilkinson property.[5] The County, by contrast, has

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4. Perhaps noteworthy, the County, itself, did not join Brendale in appealing the district court's decision.

5. As alleged, Yakima Nation's interest in controlling land use in the open area, although obviously less compelling than that in the closed area, appears also to be strong. The open area is largely used for agriculture, upon which many tribal members depend for (continued)

not suggested any off-reservation interest in imposing its zoning code on fee land within the reservation. See Mescalero Apache, 462 U.S. at 336, 103 S.Ct. at 2387 ("The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. Thus a State seeking to impose a tax on a transaction between a tribe and

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their livelihood. Specifically with regard to the Wilkinson property, Yakima Nation has asserted that the proposal would require the construction of new roads and could alter the flow and quantity of ground water. Yakima Nation alleges that there is a substantial danger of severe erosion and runoff from the subdivision and that the contemplated change in the land use of the Wilkinson parcel and development of the surrounding area, would interfere with Yakima Nation's interest in the integrity of its culture and way of life. Sacred burial grounds are located in this area. Finally, Yakima Nation alleges that increased development would require additional police services.

nonmembers must point to more than its general interest in raising revenues. A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.") (citations omitted).

We conclude, however, that for this court to weigh the varying interests at this time would be premature. Because the district court found that Yakima Nation lacked the authority to zone fee land owned by non-Indians within the open area, it did not make findings of fact concerning the interests asserted, nor did it balance the federal, tribal, and state interests. We therefore remand to the district court the issue of whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-Indians in the open area.

CONCLUSION

The district court's judgment in Whiteside I is affirmed. Its judgment in Whiteside II is reversed and remanded.

YAKIMA INDIAN NATION, Plaintiff

v.

WHITESIDE, et al., Defendants,

No. C-83-724-JLQ.

United States District Court,

E.D. Washington.

Sept. 11, 1985.

MEMORANDUM OPINION

QUACKENBUSH, District Judge.

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any land use within the so-called "Open Area" of the Yakima Indian Reservation (Reservation) which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners; the Director of Yakima County Planning Department; and Stanley Wilkinson, record owner of fee land within the "Open Area."[1] Specifically,

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1. In addition to those defendants, the complaint also named Jim Gatliff and Dick Keller, prospective purchasers of some of the at-issue property. By oral ruling on May 23, 1984 the court, pur-
(continued)

the plaintiff seeks to impose its zoning and land use law on a 32 acre parcel of land owned by defendant Wilkinson. Additionally, the Yakima Nation asks the court to limit Yakima County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Wilkinson's property is paramount and exclusive.

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Wilkinson property violated Section 1 of

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suant to Fed.R.Civ.P. 41(b), rendered judgment in favor of defendants Gatliff and Keller.

the Civil rights Act of 1971. (Codified at 42 U.S.C. § 1983).

Following a four day bench trial the court entered an oral decision favorable to the defendants. (Cr.Rec. 81).[2] What follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composite of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating

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2. The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction issue. The Yakima Nation's Section 1983 claim and pendent state claim were expressly excluded from the oral decision but are addressed in this written opinion.

with the United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit." This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is located in southeastern Washington. It's exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual members (trust lands). The remaining land is held in fee by Indians or non-Indian owners (fee land). The majority of this fee land lies within the three incorporated towns in the northeastern part of the Reservation -- Toppenish, Wapato and Harrah. The remainder is

scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

Most of the trust land lies within the Reservation's "Closed Area", an area accessible only by members of the Yakima Nation and its permittees. This area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land. The Closed Area is predominately forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary.

The "Closed Area" is relatively undeveloped. There are no permanent residences in the Yakima County portion of the area. Its abundant flora and fauna serve as a source of food for many members of the Yakima Nation; its forest provide substantial economic support; and its intangible and spiritual values play a significant role in the tribal culture. In sum, as this court found in Yakima Indian Nation v. Whiteside, et al., 617 F.Supp. 735 (1985) ("Whiteside I"), "the Closed Area is an integral part of the Yakima Indian Nation."

The "Open Area", on the other hand, is strikingly dissimilar to the "Closed Area." As its name suggests, access to the area is not limited by the Yakima Nation and non-tribal members move freely throughout the area. Compared to the predominately forested "Closed Area", the "Open Area" is primarily composed of

rangeland, agricultural land and land being used for residential and commercial purposes. Another distinguishing characteristics is that almost half of the total "Open Area" acreage is fee land. That factor, coupled with the extensive county-maintained road system and the residential and commercial developments render the "Open Area" a sharp contract [sic] to the pristine, wilderness-like character of the "Closed Area."

Tribal Land Use Regulations:

In October 1970, the Yakima Nation instituted its first Zoning Ordinance. That ordinance was a six page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise

lawful uses were generally permitted except certain activities requiring a conditional use permit. E.g., asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all the members of the Tribal Council, sat as the Board of Appeals from administrative decisions and the Hearing Board for conditional use applications. Its decisions were the final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page document resembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive.

Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned Development Districts, provides for Special Use Permits and creates five categories of the Use Districts. These Use Districts are: Agricultural, Residential, Commercial, Industrial, and Reservation Restricted Area.

The at-issue Wilkinson property is zoned "agricultural" by the Yakima Nation. According to the Amended Zoning Ordinance, that designation denotes that the "principal use of the land is for agricultural purposes." Buildings are prohibited on land zoned "agricultural", except as follows: agriculture-related buildings, agriculture products processing plants, buildings on public parks and playgrounds and single-family dwellings. The minimum lot size in an agriculture use district is five acres. The

Yakima Nation's designation of the at-issue property as "agriculture" and the resultant limited uses is the primary source of the present litigation.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, The Yakima County Code, was first enacted in 1972. It was struck down for a procedural defect, but readopted in its same for in October, 1974. Within its seventy-two pages, the Yakima County code identifies numerous specified use districts which generally regulate agricultural, residential, commercial,

industrial, and forest-watershed uses. In the reservation area, the official county zoning map segregates the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

Yakima County has designated the subject Wilkinson property as "general rural." "General rural" is a use district established in a 1982 amendment to the Yakima County Code which eliminated a single "agricultural" designation and replaced it with three separate use districts: "exclusive agricultural;" "general agricultural'" and "general rural." Both the "exclusive" and "general" agricultural districts permit varied agriculture-related uses. The main difference between these two agricultural districts is that the former has a minimum lot size of 40 acres while the minimum lot size for the latter is 20

acres. Both agricultural districts, however, allow the parcel to be subdivided once every five years to create a lot no more than two acres but no less than one-half acre in size. The two agricultural districts are expressly designated to protect the county's agricultural land and prohibit or minimize the impact of uses which are inconsistent with agricultural uses.

The "general rural" designation of the Wilkinson property, on the other hand, is designated to accommodate a broader range of uses. This district is intended to "provide protection for the county's unique resources and land base;" "minimize scattered rural developments . . . by encouraging clustered development;" and "permit only those uses which are compatible with [the] rural character." Although the "permitted uses" for this district are identical to those

of the "exclusive" and "general" agricultural districts, the potential number and variety of uses possible via special use permits are considerably greater. The minimum lot size in the "general rural" district is one-half acre but the average size of lots created by a subdivision must be at least one acre.

In addition to its comprehensive zoning regulations, Yakima County has other land use regulations applicable to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adjacent to shorelines. Also, as a participant in the federal flood insurance program the county attempts to control flood plain development. Another of

Yakima County's state-mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

The Wilkinson Property:

Defendant Wilkinson owns a 40 acre tract of fee land in the extreme northeast corner of the Reservation.[3] The land is approximately three-quarters of a mile south of the Reservation's northern boundary. The parcel is situated on the northern slope of Ahtanum Ridge, overlooking the Yakima Municipal Airport (1½ miles to the north) and the City of Yakima (3 miles to the north). Wilk-

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3. Wilkinson is a non-Indian and is not a member of the Yakima Nation.

inson's property is bordered to the north by trust land and to the east, south and west by fee land. Currently, the property is vacant sagebrush land.

In September 1983 defendant Wilkinson applied to the Yakima County Planning Department to subdivide a portion of his 40 acre parcel. Specifically, by filing five contiguous short plat applications, Wilkinson proposed to subdivide 32 acres into twenty lots. The lots sizes ranges from 1.1 acres to 4.5 acres. The proposal contemplates that each lot will be used for a single family residence to be served by individual well and on-site septic systems.

In compliance with the county's Environmental Ordinance, Mr. Wilkinson submitted an Environmental checklist from which the county Planning Department could assess the potential impact of his proposed development and decide whether

an Environmental Impact Statement (EIS) was warranted. As discussed infra, the Planning Department initially issued a Declaration of Significance, necessitating the preparation of an EIS. That declaration was, however, withdrawn and replaced by a Declaration of Non-Significance after Wilkinson agreed to modify his proposal as suggested by the county.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal were two-fold: (1) that Yakima County was without authority to regulate the land use of the Wilkinson property and (2) that the proposed Wilkinson development would significantly affect the environment and therefore an EIS was required. A hearing on the Tribe's appeal was conducted by the County Commissioners on October 25, 1983. During

the early stages of the hearing, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based upon advice from the county legal department, the Commissioners concluded that the appeal was properly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony and cross-examination of witnesses, the Commissioners found that the Wilkinson proposal would not have a significant impact on the environment and affirmed the County Planning Department's Declaration of Non-Significance.

Yakima County has withheld final disposition of Wilkinson's subdivision proposal pending the outcome of this litigation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

1. The proposed Wilkinson subdivision described real property situated in Yakima County, Washington:

> The Northeast Quarter of the Southwest Quarter of Section 10, Township 12 North, Range 18 East, W.M.

The property is approximately three miles south of the City of Yakima, one-quarter mile south of McCullough Road and approximately one-half mile east of 42nd Avenue.

2. The subject parcel lies within the exterior boundaries of the Yakima Nation Reservation in the so-called "Open Area."

3. Three incorporated municipalities -- Harrah, Toppenish and Wapato -- with a total population of approximately 10,000 people lie within the "Open Area."

4. Roughly eighty percent of the "Open Area"'s residents are non-Indians. Those individuals represent approximately fourteen percent of the total population of Yakima County.

5. The "Open Area" is serviced primarily by close to five hundred miles of Yakima County-maintained roads.

6. Agriculture and related activities are the leading source of income in the "Open Area."

7. Yakima County has a Comprehensive Plan and a Rural Land Use Plan expressly designed to protect the county's valuable agricultural land and other resources.

8. To effectuate the goals of those plans, the county has adopted a comprehensive zoning ordinance. The "Open Area" is primarily zoned "exclusive agriculture", "general agriculture" and "general rural." "Exclusive" and "general" agriculture zones predominate. Within the "Open Area" that zoning scheme achieves a delicate balance of protecting agricultural land and other resources while allowing for some development.

9. In part due to the parcel size requirements of the county's "exclusive" and "general" agriculture zones, i.e., 40 and 20 acres respectively, the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's "agricultural" use district which allows agricultural land to be divided into 5-acre lots.

10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.

11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The plaintiff has not demonstrated how Yakima County's regulation of the land use of Wilkinson's "Open Area" property in any way places its economic security in jeopardy.

12. In contrast to the "Closed Area," the "Open Area" is not of a unique religious or spiritual significance to the members of the Yakima Nation. The county's regulation of the Wilkinson property will not significantly infringe on those cultural values.

13. While the court is aware of the special role which land and other natural resources play in the culture of the Yakima Indian Nation, the court finds that the county's exercise of its land use regulatory jurisdiction over the subject property does not threaten those aspects of the tribal culture.

14. The Yakima Nation's political integrity will not be diminished. The County's regulation of Wilkinson's fee land will not hinder the Yakima Nation from exercising its regulatory jurisdiction over the trust land.

15. In sum, the court finds that Yakima County's exercise of its regulatory jurisdiction over the at-issue Wilkinson property does not threaten and will not have a direct effect on the Yakima Nation's political integrity, its economic security or its health or welfare.

LEGAL ANALYSIS

The court's legal analysis must focus on three issues: the regulatory jurisdiction question; the Yakima Nation's Section 1983 claim; and, the pendent state claim. Each of these issues will be addressed separately.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regu-

late the activities of defendant Wilkinson on his Open Area fee land. If the tribe does indeed have that power, then the next inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. If, on the other hand, the Yakima Nation lacks the power to assert regulatory jurisdiction over Wilkinson's property, then the second step in the analysis is not necessary -- Yakima County will have exclusive authority over Wilkinson's fee land.

1. Tribal Authority: Public Law 280:

The defendants argue that Congress has stripped the Yakima Nation of any power it may have had to exercise civil regulatory authority over Wilkinson's property. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of

August 15, 1953, 67 Stat. 588, 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[4] The gist of their argument is

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4. WASH.REV.CODE § 37.12.010 provides:

> Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:
>
> (1) Compulsory school attendance;
>
> (2) Public assistance;

(continued)

that P.L. 280 was a grant of jurisdiction to the state (and therefore the county) which necessarily must have withdrawn jurisdiction from the Tribe. This argument is without merit for several reasons.

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(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways. Provided, further that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority -- no such grant was necessary. Under P.L. 280, states retain the same regulatory jurisdiction over the on-reservation activities of non-Indians "that they enjoyed prior to that Law". White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981). And it is settled law that long before enactment of P.L. 280, states (and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. See, e.g., Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); Utah & Northern R.R. v. Fisher, 116 U.S. 28 6 S.Ct. 246, 29 L.Ed. 542 (1885). The only

limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", see e.g., Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) and the doctrine of "federal preemption." See e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's purpose. P.L. 280 was designed to remedy the problem of the lack of state jurisdiction over Indians in their dealings (criminal or civil) with non-Indians. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indian, 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No such authorization was needed, however,

as to the states' authority over non-Indians. Thus, P.L. 280 was not a grant to the states of jurisdictional powers over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state authority[5] or divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982); cert.

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5. Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. See Bryan v. Itasca County, 426 U.S. 373, 384-85, 96 S.Ct. 2102, 2108-09, 48 L.Ed. 2d 710 (1976); Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its regulatory bingo laws on the reservation); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (California municipality may not zone restricted lands); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1976 (California county may not zone restricted lands).

denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982); Sechrist v. Quinault Indian Nation, I.L.R. 3064 (W.D. Wash. 1982).[6]

2. Tribal Authority: The Montana Test:

Having concluded that P.L. 280 did not affect a Tribe's regulatory authority over non-Indian fee land, the court must now determine whether the Yakima Nation has such authority over Wilkinson's fee land. Although Indian Tribes possess "attributes of sovereignty over both

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6. Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. See, Comenout v. Burdman, 84 Wash.2d 192, 525 P.2d 217 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

their members and their territory", United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978), the dependent status of tribes and their diminished status as sovereign limits their power in relations between a Tribe and non-members of the Tribe. Id. at 326, 98 S.Ct. at 1087. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Similarly, a Tribe's inherent power to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation", New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 611 (1983), apparently that power may be exercised

over non-Indian fee lands only in limited circumstances. Montana v. United States, 45 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands." Id. at 565, 101 S.Ct. at 1258. Unfortunately, the parameters of that power are anything but settled; nevertheless, the Court has provided guidance which is pertinent to the case at hand.

The Montana Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the tribe or its members. Id. at 565, 101 S.Ct. at 1258. Such is not the case here as there is no evidence of any

"consensual relationship" between the Yakima Nation and Wilkinson which would place the subject property within the authority of the Tribe.

The second situation described by the Montana Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security of the health or welfare of the tribe." Id. at 566, 101 S.Ct. at 1258. Thus, absent a "consensual relationship", the critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. Id. at 565-66, 101 S.Ct. at 1258-59; see United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (tribe lacked power to regulate water use of

non-Indian fee landowners within the reservation); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), cert. denied, 459 U.S. 967, 103. S.Ct. 293, 74 L.Ed.2d 277 (1982); Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to fee land within the reservation); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), cert. denied, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); Sechrist v. Quinault Indian Nation, 9 I.L.R. 3064 (W.D. Wash. 1982); Lummi Indian Tribes v. Hallover, 9 I.L.R. 3025 (W.D. Wash. 1982).

As stated in the Findings of Fact, this court finds that Wilkinson's proposed development does not pose a threat to the "political integrity", the "economic security" or the "health and welfare" of the Yakima Nation. The mere fact that the Tribe's zoning ordinance differs in some respects from that of Yakima County does not rise to the level of a "threat" to the Tribe. As applied in the "Open Area," Yakima County's zoning ordinance will adequately regulate the land use of the fee lands and not pose a threat to the trust lands. Consequently, this court must conclude that the Yakima Nation is without the authority to exercise regulatory jurisdiction over Wilkinson's "Open Area" fee land.

B. SECTION 1983 CLAIM:[7]

The bases for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County Commissioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Wilkinson property violated rights enforceable under Section 1983. For the reasons discussed below, the court concludes that

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7. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

neither of these two alleged bases of Section 1983 liability has merit.

Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[8] the court finds that it was not denied due process of law by the Yakima County Commissioners. The purpose of the hearing conducted on October 25, 1983 was to hear the Tribe's appeal of the Planning Department's Declaration of Non-Significance. The hearing was statu-

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8. The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other person within the jurisdiction thereof . . . ." 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws . . . ." Id.

torily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the complexity of this lawsuit and the cases cited in this opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue of jurisdiction, particuliarly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state its

objections to the county's jurisdiction over the Wilkinson property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. See generally Mathews v. Eldridge, 426 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

While the Tribe's first basis for its Section 1983 Claim must fail because no due process deprivation occurred, its second basis fails because the county has not infringed on any "right" of the Tribe: the Yakima Nation has no "right" to regulate the land use activities on the Wilkinson property and therefore the county's regulation of that property does not infringe on any "right" of the

Tribe.[9] Thus, the court concludes that the plaintiff has not stated a Section 1983 claim and is therefore not entitled to attorney's fees under Section 1988.

PENDENT CLAIM: SEPA VIOLATION

In addition to the regulatory jurisdiction issue which is governed by federal law, the Tribe asserts a pendent claim based upon Washington state law. Specifically, the Tribe alleges that Yakima County erred in its determination that the proposed Wilkinson subdivision would not have a significant adverse

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9. In contrast to this case, in Whiteside I the court determined that the Yakima Nation does have the authority to exercise regulatory jurisdiction over fee land within the "Closed Area." Furthermore, the court concluded that the County of Yakima is "preempted" from exercising its concurrent jurisdiction over that same land. Nevertheless, the court held that "preemption" does not give rise to a claim cognizable in a Section 1983 action.

impact on the environment. See Wash.Rev.Code 43.21C.030(c). For the reasons discussed below, the court concludes that the declaration of non-significance was not "clearly erroneous" and, therefore, is affirmed. See, Norway Hill v. King County Council, 87 Wash.2d 267, 552 P.2d 674 (1976) (standard of review of "negative threshold determinations" governed by "clearly erroneous" test).

Initially, Yakima County concluded that the proposed subdivision would have "a significant adverse impact on the environment." (Trial Exhibit 221-15). That Declaration of Significance identified two factors which led to the decision: (1) the potential impact of 1.5 miles of private access roads; and (2) the potential impact of private septic systems and individual wells in the "event of future redivision of the 20 lots." Id. The Declaration of Signi-

ficance stated, however, that it could be withdrawn and replaced with a declaration of non-significance if certain conditions were met. Id. Those conditions were designed to prevent or mitigate the potential adverse effects of the private access road, and the proliferation of individual septic systems. Id.

By written agreement with the County of Yakima, Mr. Wilkinson modified his proposal by agreeing to have the private roads designed and constructed according to proper engineering standards and maintained by a private road maintenance association. (Trial Exhibit 221-18). Additionally, Wilkinson agreed that "[a] note shall be placed on the face of each short plat limiting further division of any of the lots described on the said short plats unless and until an approved public water supply is developed to serve all of the parcels." Id. Because of

these modifications the County withdrew its Declaration of Significance and issued a final Declaration of Non-Significance (Trial Exhibit 221-19), thereby negating the requirement that an Environmental Impact Statement be prepared.

In a timely manner, this Tribe appealed the Declaration of Non-Significance to the Yakima County Commissioners. Following a hearing, the Commissioners found, inter alia, that "the potential adverse environmental impacts of the proposal as originally presented will be mitigated or prevented by the measures outlined in the agreement." (Trial Exhibit 222). Based upon their findings, the Commissioners concluded that "the proposed contiguous short plats submitted by Stanley L. Wilkinson will not have a significant adverse environmental impact" and affirmed the Declaration of Non-Significance. Id.

This court's review of the County's Declaration of Non-Significance is limited; the only question is whether it was "clearly erroneous." Norway Hill v. King County Council, 87 Wash.2d 267, 552 P.2d 674 (1976). A determination is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Hayden v. Port Townsend, 93 Wash.2d 870, 880, 613 P.2d 1164 (1980) (quoting, Norway Hill, 87 Wash.2d at 274, 552 P.2d 674). In applying that standard, this court is mindful that the "decision of the governmental agency shall be accorded substantial weight." Id. at 880, 613 P.2d 1164 (quoting, Wash.Rev.Code 43.21C.090).

The Tribe, while conceding that the written agreement (Trial Exhibit 221-18) eliminated the pretrial adverse impact of

the private roads, argues that the septic system problem has not been eliminated or sufficiently mitigated. That argument, however, was rejected by the County Commissioners who found that the septic system problem "will be mitigated or prevented by the measures outlined in the agreement . . ." (Trial Exhibit 222). This court must also reject the Tribe's argument as the County's decision is not "clearly erroneous." It is supported by the recommendation of the Yakima Health District which had performed on-site inspections of soil profile holes (Trial Exhibit 221-12); the soil and slope classification of the United States Soil Conservation Service which indicates that portions of the subject property are suitable for "septic tank absorption fields" (Trial Exhibit 221-8); and, the testimony of Mr. Anderwald who stated that each of the newly created lots had a

site suitable for an individual septic system. (Trial Exhibit 219 at p. 19). That evidence, combined with the fact that no further subdivision is to occur absent the installation of a community water system leads this court to conclude that no "mistake has been committed," Norway Hill, 87 Wash.2d at 274, 522 P.2d 674, and the Declaration of Non-significance was not "clearly erroneous."

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered against the plaintiff and in favor of defendants to the following extent:

1. The court declares that the Yakima Nation has no authority to exercise regulatory jurisdiction over the land use of the Wilkinson property described in this memorandum opinion.

Plaintiff's request for declaratory and injunctive relief is DENIED and its regulatory jurisdiction claim is DISMISSED WITH PREJUDICE.

2. Plaintiff's Section 1983 claims are DISMISSED WITH PREJUDICE.

3. Yakima County's Declaration of Non-Significance is AFFIRMED and plaintiff's pendent state SEPA claim IS DISMISSED WITH PREJUDICE.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,	)	
Plaintiff,	)	No.C-83-724-JLQ
vs.	)	
COUNTY OF YAKIMA, JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD F. ANDERWALD, STANLEY WILKINSON, JIM GATLIFF, AND DICK KELLER,	)	May 24, 1984 Yakima, Washington 2:45 o'clock, p.m.
Defendants.	)	

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

BEFORE THE HONORABLE JUSTIN L. QUACKENBUSH, Judge.

ENTERED this ____ day of June, 1984.

JUSTIN L. QUACKENBUSH
United States District Judge

THE COURT: This case, of course, is a companion case to the so-called Whiteside I case, which is Cause No. C-83-604-JLQ, Whiteside I being a case recently decided by this Court, by this Judge, involving the Closed Area of the Yakima Indian Reservation. For reasons which I stated in my Oral Opinion in Whiteside I, and for other reasons stated in my soon-to-be-filed written Opinion in Whiteside I, I determined that Yakima County was without jurisdiction to impose its zoning code on deeded land within the Closed Area portion of the Yakima Indian Reservation.

While this case also involves land within the exterior boundaries of the Yakima Indian Reservation, the factual circumstances in the two cases are strikingly distinct. They are as different, in my opinion, as night and day. I will explain those distinctions somewhat in this Opinion.

In the Closed Area, as referred to in Whiteside I, the Closed Area encompasses some 870,000 acres of land. Approximately 740,000 acres of land in the Closed Area was within Yakima County. Only some 25,000 acres, or approximately three percent of that total land, was deeded land which was held in trust. Most of that three percent, or that relatively miniscule 25,000 acres, was owned and is owned by a timber company. Very few, if any, permanent residents reside in the Closed Area, and it is my recollection from the testimony that no non-Indians were permanent residents of the Closed Area.

Contrasting those circumstances, in the Closed Area is the completely different geographic and demographic facts that apply and exist in the so-called Open Area, and I am, once again, referring to the Open Area as being that portion of

the Yakima Indian Reservation not included in the Closed Area as it was defined for me and to me during the trial of Whiteside I.

While the total acreage in the Closed Area really isn't clear, and very frankly, Mr. Hovis, I want to say that the acreage total that Mrs. Hill had from the computer, and I'm not saying Mrs. Hill made an error, I'm very frankly troubled by computer statistics, it would appear to me from the statistics furnished me in Whiteside I that the total acreage in the Open Area is some 350,000 acres. Whatever the acreage is, a substantial portion of the land within the Open Area is deeded non-trust land.

I surmise that if one were to utilize the yellow area suggested by Mr. Sullivan in his argument from Exhibit No. 250, one could well find that the non-trust ownership within that yellow area would

approach some fifty percent, or some figure close thereto.

The population statistics are completely different between the Closed Area and the Open Area. I don't recall that there were population statistics furnished in Whiteside I. It may well be there weren't any furnished because there weren't any permanent residents. As I have indicated earlier, it is my recollection from Whiteside I that there were very few, if any, permanent residents in the Closed Area or portion of the reservation.

In contrast to those figures, in the Open Area, an area that would appear to be about half the size of the Closed Area, I find that there were some 25,000 residents of whom approximately 5,000 or one-fifth are Indians, or some twenty percent, the other eighty percent being non-Indians.

Within the Open Area of the reservation are three incorporated cities: Toppenish, Washington, with a population of 6,575; Wapato, Washington, with a population of 3,310, and Harrah, Washington, with a population of 345. So, as I have indicated, the demography of the area is different, the population is different, and the size of the area is different.

The Closed Area is primarily forest land, which forest land is responsible for producing, as I recall, approximately ninety percent of the Yakima Indian Nation's annual income. Contrasted with that is the use made of the Open Area, which is primarily and predominantly agricultural.

I find that the county has exercised zoning jurisdiction on deeded land in the Open Area for the past thirty-five years. Other than the issues raised in

this case, the Wilkinson Plat, and with one other possible exception which I believe was the blood plant down around Toppenish, it appears that the Yakima Indian Nation has not legally contested the county's jurisdiction to zone non-trust, deeded lands within the Open Area of the Yakima Indian Reservation.

There, likewise, are substantial differences, in my opinion and I so find, between the county's interest in the Closed Area and the county's interest in the Open Area. I found in Whiteside I, the Closed Area case, that there really were no interests that the county had in attempting to authorize Mr. Brendale to build a residential development in the middle of the Closed Area. For that reason, I further found that the county was preempted from attempting to impose its zoning code even over deeded land owned by non-Indians in the Closed Area.

Contrasting those circumstances or lack thereof as to the Closed Area, in the Open Area the county's presence and interest are obvious. The county has built and maintained 487 miles of road, some 240 miles of which are hard-surfaced. The great majority, approximately eighty percent, of the residents in the Open Area are non-Indians. The county has continuously applied its comprehensive zoning plans, zoning code, and subarea plans on the deed land in the Open Area.

I further find that the county's interest is evidenced by the county's Shoreline Management Program, which is required by state law, and which is applied by the county on Ahtanum Creek and on the Yakima River. The county's presence is further evidenced as is the county's interest by its participation in the Flood Hazard Program, which enables a

resident in the Closed Area to participate in the Federal Flood Insurance Program.

The evidence further indicates that all but some one hundred children, the one hundred being Indian children who attend an Indian school, but the evidence indicates that the remainder of the children, both Indian and non-Indian, attend schools that are public schools rather than being operated by the Yakima Indian Nation.

Those are examples of the interest of the county in maintaining its presence in the Open Area of the Yakima Indian Reservation. I find that this county presence does not burden the Tribe or the Tribal Members per se.

During Mr. Hovis' argument on the Rule 41(b) Motion yesterday, I discussed with Mr. Hovis the history of the dealings by the United States' Government

with the Indian Tribe. Setting aside the question of whether or not the treaties were fair and whether they were executed under duress, the conduct of the United States' Government in honoring treaties is not one that would make any person proud thereof. We, citizens of this country, and those of us particularly who are involved in its legal system take great pride in the sanctity of contract. That sanctity of contract apparently was subjugated by the feeling of the United States' Government and its leaders, at least in the 1880's, that the United States' Government was in the role of a conquerer who, at its will, could modify the terms of an agreement reached by alleged good faith negotiations between sovereign nations and its people. That, however, is not a matter that I have the power to rectify. That is a matter for congressional enactment, for

the Legislative Branch to rectify if they determine that appropriate action should be taken.

The relationship between the United States' Government and the Tribes has come full circle. From the time of the Treaty, a philosophy of assimilation was adopted as was evidenced by the Dawes Act and the General Allotment Acts in the 1880's where despite the treaties, the government of this country decided that they would issue patents to individual Indians over portions of the reserved reservations, and if all of the land was not issued under eighty acres, as I recall, patents, then the reservations, despite the treaties, would be opened up for homesteading and allotment to White Men. That is the history; that happened.

From that time, assimilation or an assimilist philosophy existed to the point not too many years ago, I believe

in the early '60's and late '50's, when the philosophy was one of termination; to-wit, terminate the reservations, pay the Indians, the Members of the Yakima Indian Nation or other Indian Nations, the fair market value allegedly of their lands, terminate their dependent status and assimilate those individuals into the main stream of the dominant people.

Now, I believe, we have come full circle to the philosophy of sovereignty once again existing, or at least a recognition that the Indian Nations have retained some inherent sovereignty. But, the history of the conduct of by the United States' Government is clearly evidenced by Exhibit No. 200. Exhibit No. 200 reflects exactly the history of the dealings by the United States' Government with the Indian People, the result being the factual situation with which I must deal; to-wit, a substantial

portion of the Open Area of the Yakima Indian Nation being held in fee rather than being held in trust for the benefit of the peoples of the Yakima Indian Nation as was intended in the Treaty of 1855.

The witnesses who testified for the Nation have impressed me with their sincerity. They are absolutely and unequivocally sincere and honest in their beliefs that they are, in fact, as I believe Commissioner Tollefson suggested, stewards of the land, a philosophy somewhat different than those who have the commodity philosophy as suggested by Commissioner Tollefson. But I must resolve this matter not on the basis of what I think is fair; I am bound by the rule of law.

The Yakima Indian Nation, I believe, as part of their stewardship philosophy, adopted a zoning code for all of the land

within the exterior boundaries of the reservation. The primary goal of that code was to preserve the agricultural land in the open space area. I find that the goals of Yakima County are the same. I do not feel it is necessary for me, nor appropriate for me, to determine which code is better structured to attain the goals. My finding that they have common goals I believe is sufficient to be the basis for my determination in this case.

The two codes, the two philosophies of the Yakima Indian Nation and Yakima County are, in my opinion, consistent in policy and purpose. For the reasons which I have previously stated in my decision in Whiteside I, I find that Public Law 280 did not give the county exclusive zoning jurisdiction over deeded land within the exterior boundaries of the Yakima Indian Reservation. In my

opinion, this case must be decided under the guidelines and following the teachings of Montana v. United States.

Montana v. United States, 450 U.S. 544, a 1980 decision of the United States Supreme Court, establishes the general principles which I feel control in this case. The bottom line, of course, is that which we have discussed throughout Whiteside II. White [sic] an Indian Tribe cannot exercise power which is inconsistent with their diminished status as sovereigns, on the other hand, a Tribe may and does retain the inherent power to exercise civil authority over the conduct of non-Indians on those non-Indian's fee lands within the exterior boundaries of the reservation when that non-Indian's conduct threatens or has some direct affect on the political integrity, the economic security, or the health or welfare of the Tribe. In making those deter-

minations, I am bound by the fact that the inherent sovereignty retained by an Indian Nation, in this case the Yakima Indian Nation, is not unequivocal or unrestricted.

In United States v. Wheeler, 435 U.S. 313, the Court noted that Indian Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." That is the philosophy that was utilized in my opinion in Whiteside I. However, the Wheeler Court pointed out that despite those inherent attributes of sovereignty, "the Indians have lost many of the attributes of sovereignty." The Wheeler Court pointed out that there are certain areas where, "implicit divesture of sovereignty has been held to have occurred," as to the Tribe, and these include, "the relations between the Indian Tribe and nonmembers of the Tribe." The Wheeler Court

pointed out that limitations upon the Tribe's sovereignty rests on the fact that there is a dependent status of Indian Tribes, and that that dependent status is necessarily inconsistent with the right of the Tribe to determine their external relations as opposed to the right of the Tribe to have its self-government, as has been pointed out to this Court by Mr. Hovis. That, of course, involves the relations of the Members of the Tribe among themselves.

In utilizing the Montana standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my finding that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members.

The argument has been made that checkerboard zoning is either impossible or difficult to administer. I don't find that from the evidence. I find that of necessity, so-called checkerboard zoning or appropriate multi-jurisdiction zoning is required in today's society, whether it be in the relations between counties and cities or towns, or between counties and Indian Tribes.

As is pointed out in the majority Opinion in the State of Washington v. The Confederated Bands and Tribes of the Yakima Indian Reservation, a case that counsel in this case argued before the United States Supreme Court, the lines that were drawn as a result of Public Law 280 may be difficult to administer, and there may be difficulties existing in the administration of the zoning code over the deeded land in this case, but the Yakima Indian Nation Court, the majority

in the case, indicated that such classifications tend to pervade the law of Indian jurisdiction.

The Washington v. Yakima Indian Nation Court further found that checkerboard jurisdiction is not novel in Indian law and does not as such violate the Constitution. I recognize that this is an analysis on a Constitutional basis as opposed to the Moe case that I discussed with counsel during the argument on the Motion to Dismiss.

I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine.

By reasons of those findings, I find that there is no evidence whatsoever presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area would interfere with the political integrity, economic security, or health or welfare of the Tribe.

I am satisfied, even though the Tribe in this case feels that the Wilkinson Zone change may have been inappropriate, I am satisfied that the three members of the Yakima County Board of County Commissioners will give just and due consideration to the views of the Tribe and the Tribal Members in making its zoning decisions by reason of my findings which I have just made. I find that, in fact, Yakima County does have the exclusive jurisdiction over the zoning of the deeded land within the Open Area of the Yakima Indian Reservation.

I was impressed with the testimony of Commissioner Tollefson, and I assume that he represents the philosophy of the Board of County Commissioners. He is sensitive, in my opinion, to the views of the Members of the Yakima Indian Nation. I believe that the Board of County Commissioners and their agents, the Planning Director, Mr. Anderwald, are of a cooperative viewpoint. I sincerely believe that despite this Court's decision today, that Yakima County and the planning staff of Yakima County will give proper consideration to the viewpoints and the desires and goals of the Yakima Indian Nation as to the Open Area.

Zoning in and of itself is one of the most controversial things, I think Mr. Hovis spoke to this, and any of us who dealt in such matters through our legal careers recognize it as one of the most difficult areas of the law. Competing

viewpoints always surface. One cannot but help to give due respect to county commissioners who are called upon to make many decisions, but the most difficult decisions in my experience are those involving zoning matters.

I suggest to the Yakima Indian Nation that despite your sincere believe that all of the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the Legislative Branch of this Government to decide; to-wit, Congress. It involves funding and the competing interests for funding, and that inherent and sincere desire which you should burn brightly in my opinion. But, while you should and will, I'm sure, retain that deep sense of commitment to accomplishing that end, in my judgment during the interim period,

however long it may take, I would suggest to you that it is in the best interests of the Tribe in retaining that basic nature of the land that is the subject of this suit. It is in your best interests to participate and make your views known at any time a proposal comes to your attention that may be in any manner inconsistent with your truly held and firm beliefs.

Finally, that brings me to the challenge to the procedural aspect. I find that minimal due process is present in the notice operations and notice procedures followed by Yakima County in the giving of a notice to the appropriate planning agency of the Yakima Indian Nation. I think it is clear from the evidence that Yakima County does not have access to the true ownership rolls of trust property; the Yakima Indian Nation does, and it would seem to be appropriate

in my opinion to have the Yakima Indian Nation then furnish the further notification to those fractionated property owners as to any parcel that is being subjected to jurisdiction by Yakima County.

Having determined that Yakima County does, in fact, have exclusive jurisdiction over the deeded land in the Open Area, it remains, of course, for the Court to consider the pendent claim under SEPA. I very seriously question whether it is appropriate for Federal Court to make a state court judgment, what I think should be a state court decision, on whether or not a county has complied with state laws. It is, of course, permitted for a Federal Judge to make that determination, under the doctrine of pendent jurisdiction, which has been invoked in this case.

The trial briefs submitted to me have not addressed the SEPA claim, the penden claim, I believe because it was recognized that the principle issue would be determined before the SEPA issue would be addressed. But, I assume now it would be appropriate to have a briefing period to address the SEPA claim.

How much time would you want on that, Mr. Hovis? As I read the Washington law and from my own experience, the matter is determined on the record.

MR. HOVIS: That's correct, you Honor. I'd like to have some time, your Honor, because of the press of other business, and I would like to have as much time as I can have. If I could have thirty days to get my brief in, I would appreciate it.

THE COURT: All right. I will permit that.

Counsel, I intend to sign the final orders in Whiteside I and Whiteside II on the same day; I think that is appropriate in case you wish to have the matter reviewed. Clearly, my findings are binding, as you recognize, on any appellate court, but there is, as Mr. Sullivan has clearly pointed out in his strenuous argument, The Public Law 280 argument, and I'm sure you'll have the countervailing arguments in Whiteside II, but I think it is appropriate that I sign the final order on -- even though I've decided these two cases now -- the final order that would start the time running on any appellate process on the same day, because I'm sure that these may well be cases --

MR. HOVIS: It would be well to be consolidated at least on the appeal basis for argument, your Honor.

THE COURT: We still have open the 1983 issue, at least as to attorney's fees in Whiteside I. I don't know what may be coming from the county as to the 1988 claim in Whiteside II, but I think it is appropriate that all these matters be finalized in one day.

I'll allow you thirty days, Mr. Hovis, and fifteen days to respond, because I'm sure you have addressed these matters before, Mr. Sullivan and Mr. Austin. You probably have your brief bank well prepared.

Are there any other matters that need to be decided today, or scheduling on these matters?

MR. HOVIS: I can't see any, your Honor.

THE COURT: Mr. Sullivan?

MR. SULLIVAN: I don't believe so, your Honor.

THE COURT: I want to compliment counsel. It's a real pleasure to try a case as difficult as this one is with the two experts, in my judgment, in the field of Indian law on these subjects; two attorneys who have had much, if not more experience in Indian law cases of any still practicing today. I'm not trying to date either one of you gentlemen, but I do appreciate the job that's been done. It makes it enjoyable to try such cases, even though the decisions in these two cases were difficult, and I appreciate the job that you have done in these cases.

YAKIMA INDIAN NATION, Plaintiff

v.

WHITESIDE, et al., Defendants.

No. C-83-604JLQ.

United States District Court,

E.D. Washington.

Sept. 11, 1985.

MEMORANDUM OPINION

QUACKENBUSH, District Judge

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any land use within the "Closed Area" which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners, the Director of Yakima County Planning Department and Philip Brendale, record owner of fee land within the exterior boundaries of the Yakima Indian Reservation (Reservation).[1] Speci-

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1. In addition to those defendants, the complaint also named Frank Glaspey, co-developer of the proposed Brendale property development. By court Order dated February 10, 1984, defendant (continued)

fically, the plaintiff seeks to impose its zoning and land use law on a development proposed by defendant Brendale within the so-called "Closed" area of the Reservation. Additionally, the Yakima Nation asks the court to limit Yakima County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Brendale's property is paramount and exclusive.

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Brendale property violated Section 1 of

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Glaspey was dismissed with prejudice. (Ct.Rec. 127).

the Civil Rights Act of 1871. (Codified at 42 U.S.C. § 1983).

The court has previously entered both a Temporary Restraining Order and a Preliminary Injunction which restrained defendant Brendale from changing the land use of the subject property (Ct.Rec. 12, 42). Thereafter, a four day trial was held and at its conclusion the court entered an oral decision favorable to the plaintiff.[2] (Ct.Rec. 128). What follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

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2. The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction issue. The Yakima Nation's Section 1983 claim was expressly excluded from the oral decision but is addressed in this written opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composite of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating with the United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit." This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is located in southeastern Washington. Its exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual members (trust lands). The remaining land is held in fee by Indians of non-

Indian owners (fee land). The majority of this fee land lies within the three incorporated towns in the northeastern part of the reservation -- Toppenish, Wapato and Harrah. The remainder is scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

Most of the trust land lies within the Reservation's "Closed Area". This area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land. The Closed Area is predominately forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its

eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary. A state-maintained highway, U.S. 97, cuts across the southeastern portion of the area and several Bureau of Indian Affairs (BIA) maintained arterials provide access to the closed area's interior.

Apart from the "exclusive use and benefit" language in the treaty, it is unclear when the "Closed Area" was officially declared off-limits to the general public. It is undisputed that by Tribal Resolution dated August 11, 1954, the area was declared "to remain closed to the general public" to "protect the [Closed Area's] grazing, forest and wildlife resources." Entry into the area was restricted to enrolled members of the Yakima Tribe, official employees, permittees and persons with bona fide busi-

ness and property interests. Access to the area was further limited when, in May 1972, the BIA restricted the use of the federally maintained roads within the Closed Area to Tribal members and permittees who were either record land owners or associated with the Yakima Nation through employment, business, or in some way directly benefitting the Yakima Nation.[3]

The Yakima Nation currently has a Courtesy Permit System which has expanded the original categories of permittees to include spouses and dependents of enrolled members, plus special groups or

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3. Defendant Brendale judicially challenged this closure on equal protection grounds but the court concluded no violation occurred. United States v. Philip Brendale, et ux., C-74-197 (E.D. Wash. Aug. 27, 1974) (memorandum decision). In a later action, however, Mr. Brendale was granted an easement by necessity. Brendale v. Olney, et al., C-78-145 (E.D. Wash. Mar. 2, 1981) (memorandum decision).

dignitaries visiting the reservation. For the stated purpose of the "protection and enhancement of its [Closed Area] natural resources, natural foods, medicines, game wildlife, [and] environment . . ." the permitted uses are limited to sightseeing, hiking, camping and tribal, BIA, or family related business or activity. Permittees (i.e., non-tribal members] are specifically prohibited from hunting, fishing, boating, drinking, operating vehicles off established roads, camping at other than designated campsites and removing flora, fauna, petrified wood, other valuable rocks or minerals or artifacts. Ingress and egress is monitored and controlled by four tribally-operated guard stations. Tribal police and game officers patrol the interior of the area.

Tribal Land Use Regulations:

In October 1970 the Yakima Nation instituted its first Zoning Ordinance. That ordinance was a six-page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise lawful uses were generally permitted except certain activities requiring a conditional use permit. E.g., asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all of the members of the Tribal Council, sat as the Board of Appeals from administrative decisions and the Hearing Board for conditional use applications. Its decisions were the final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page document resembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive. Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned Development Districts, provides for Special Use Permits and creates five categories of Use Districts. These Use Districts are: Agricultural, Residential, Commercial, Industrial, and Reservation Restricted Area.

The Reservation Restricted Area is another term for the Closed Area. It was

established as a "special use district" to insure continuation of the Tribal natural resources and to insure the Treaty right of tribal members to have an area in which they can camp, hunt, fish, and gather roots and berries in the tradition of their culture. Within this district only the following uses are permitted:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by Tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members;

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Section 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

These limited uses are the primary source of the present action.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, The Yakima County Code, was first enacted in 1972. It was struck

down for a procedural defect, but readopted in its same form in October, 1974. Within its seventy-two pages, the Yakima County Code identifies numerous specified use districts which generally regulate agricultural, residential, commercial, industrial, and forest-watershed uses. In the reservation area, the official county zoning map segregates the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

The fee lands within the Closed Area are zoned "forest watershed". This designation allows a diversity of uses including, for example, single family dwellings; commercial camp grounds; overnight lodging facilities having less than sixteen (16) units; restaurants; bars; general stores; souvenir shops; service stations; marinas; saw mills and the construction of dams for the production of

electricity. The minimum lot size for this use district is one-half acre, but the average size of any subdivision or short plat must be two acres. The stated purpose for the Forest-Watershed District is to facilitate land and water conservation while accommodating residential, recreational and commercial uses.

In addition to its comprehensive zoning regulations, Yakima County has other land use regulations applicable to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adjacent to shorelines. Also, as a participant in the federal flood insurance program the county attempts to control flood plan development, although

it is not clear whether any Closed Area fee lands lie within an identified flood plain. Another of Yakima County's state-mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

The Brendale Property:

Defendant Brendale owns a 160 acre tract of fee land approximately in the center of the forested portion of the Closed Area.[4] The 160 acre parcel was originally allotted to Brendale's great aunt, a member of the Yakima Nation, and

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4. Although Philip Brendale is partially of Indian blood, he is not a member of the Yakima Nation as his blood quantum apparently is not sufficient to entitle him to enrolled status in the Yakima Nation.

later inherited by Brendale's mother and grandfather who were issued a fee patent in 1963. At his mother's death in 1972, the fee parcel passed to Philip Brendale.

In January 1982, Philip Brendale filed four contiguous short plat applications with the Yakima County Planning Department. In compliance with the Environmental Ordinance, Mr. Brendale submitted an Environmental Checklist from which the planning department could assess the potential impact of his proposed development and decide whether an Environmental Impact Statement (EIS) was warranted. Having determined that the short platting did not require an EIS because it would not significantly affect the environment, the planning department issued a "Declaration of Non-Significance". Thereafter, the department notified interested parties, including the Yakima Nation, of its determination

and requested comments. At the end of the comment period, during which no reply from the Yakima Nation was received, the short plats were approved.[5]

Approximately one year later, in April 1983, Mr. Brendale submitted a long plat application to divide one of his newly platted twenty-acre parcels into ten two-acre lots. He indicated the lots were to be sold as summer cabin sites, with each site providing its own sewage treatment systems and water supply. After a review of the submitted Environmental Checklist, the County Planning

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5. Following the approval of the short plats, Mr. Brendale and the Yakima Nation exchanged offers and counteroffers for the sale of his property. Unfortunately, they were unable to agree on a price as the Tribe valued the property in light of the development restrictions imposed on property within the Closed Area by the Yakima Nation zoning regulations and Mr. Brendale valued the property based upon its recreational development potential as permitted by the zoning regulations of Yakima County.

Department issued a Declaration of Non-Significance, thus negating the necessity for an EIS.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal were two-fold: (1) that Yakima County was without authority to regulate the land use of the Brendale property and (2) that the proposed Brendale development would significantly affect the environment and therefore an EIS was required. Hearings on the Tribe's appeal were conducted by the County Commissioners on August 1, 2, 8 and 9, 1983. During the early states [sic] of the hearings, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based upon advice from the county legal department, the Commissioners concluded that the appeal was prop-

erly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony from county and tribal witnesses, the Commissioners reversed the decision of the County Planning Department and ordered the preparation of an EIS. The county was in the early stages of preparing an EIS when the present action was initiated by the Yakima Nation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

FINDINGS OF FACT

1. The proposed Brendale subdivision concerns the following described real property situated in Yakima County, Washington:

> The Northwest Quarter and Southwest Quarter of the Southwest Quarter of

the Northwest Quarter of Section 14, Township 8 North, Range 14 East, W.M.

The property is located approximately 25 miles Southwest of the community of White Swan and is northwest of the Intersection of Tepee Creek and IXL roads.

2. The proposed subdivision is fee patent land located within the exterior boundaries of the Yakima Indian Reservation. The property is within the "Closed Area" of the reservation which is accessible only by members of the Yakima Indian Nation and non-members holding permits from the Tribe or the Bureau of Indian Affairs.

3. The Closed Area covers approximately 807,000 acres, 740,000 of which falls within Yakima County. Of the latter figures, 25,000 acres (or 3.3%) is fee land. The St. Regis Paper Company owns approximately 18,000 of this fee

land. The remaining 7,000 fee acres are owned by Indians and non-Indians.

4. The proposed subdivision covers an area of 20 acres and includes ten two-acre lots. The development contemplates the placement of recreational summer cabins and/or travel trailers on the lots.

5. Each lot within the proposed subdivision is to be served by an individual well and an on-site sewage disposal system consisting of a septic tank with drain field or a holding vault. Electricity is to be provided by private generators.

6. The only road access to the proposed subdivision is via Bureau of Indian Affairs roads. The nearest county road is over 20 miles from the project.

Interior access to the lots would be provided by private roads consisting of regraded existing logging spur roads or

newly constructed roads. The roads would be dirt surfaced and would be maintained by a homeowner's association.

7. The proposed 20 acre subdivision is within a 160 acre quarter section owned by Philip Brendale, the Northwest Quarter of Section 14, Township 8 North, Range 14 East, W.M. The proposed plat is bordered on the East and North by other lands within the quarter section owned by Mr. Brendale. It is bordered on the South by lands owned in fee by the St. Regis Paper Company and on the West by lands held in trust by the United States.

The quarter section owned by Mr. Brendale is bordered on the South and East by lands owned in fee by the St. Regis Paper Company and on the North and West by lands held in trust by the United States.

8. The subject property and all surrounding lands are forested.

9. There are currently no structures located on the subject property or on the quarter section parcel owned by Mr. Brendale.

10. The current land uses of the surrounding property include hunting and fishing, food gathering, herb gathering (for medicinal and spiritual purposes), timber production and wildlife habitat.

11. The subject property and all surrounding properties are within the Reservation Restricted Area (Closed Area) use district pursuant to the Yakima Indian Nation Zoning Ordinance. The purpose of the Reservation Restricted Area is to "insure continuation of the tribal natural resources and to insure the treaty right of tribal members to have an area in which they may camp, hunt, fish and gather roots and berries

in the tradition of their culture". Within the Reservation Restricted Area no private buildings are permitted to be constructed.

12. Road construction and cabin site preparation will cause disruptions, displacements, compactions and/or covering of soil and will change ground surface relief features.

13. The proposal will cause a deterioration of ambient air quality due to vehicle exhaust emissions, dust raised on the interior and exterior access roads, and smoke from individual fireplaces or fires.

14. The proposed cabins and private roads will cause changes in absorption rates and drainage patterns. The proposal may cause deterioration of surface water quality due to runoff from disturbed sites. The proposal may alter the direction or rate of flow of ground water

and may change the quantity of ground waters by direct withdrawal from wells. The proposal may cause the deterioration of ground waters through seepage from waste water, garbage and sewer facilities.

15. The proposal will result in the destruction of some trees and natural vegetation due to cabin and road construction. The proposal may result in the introduction of new species of flora into the area through gardens or through inadvertent introduction such as weeds brought in with hay.

16. The proposal will result in the deterioration of existing wildlife habitat due to runoff, road and cabin construction, and the introduction of domestic pets. The proposal is likely to cause a change in the movement patterns of wildlife such as deer and elk due to

the subject property's proximity to a wildlife migration corridor.

17. The proposal may result in the increase in the rate of use of fuel wood.

18. The proposal will increase existing noise levels due to human activity, vehicles, and generators.

19. The proposal will produce new light due to the artificial lights associated with human occupancy.

20. The proposal will result in the alteration of the present land use of the area. The proposal is a complete change from the current use of the subject property and adjoining properties. Further, the developer indicates there will probably be future development of lands he owns to the East and North of the subject property.

21. The proposal will alter the location, distribution and density of human population in the area. The Closed

Area is uninhabited except for short term or seasonal use.

22. The proposal will result in the generation of additional vehicular movement due to increased traffic on the interior and exterior access roads.

23. The proposal will result in the need for new or altered governmental services in the areas of police and fire protection. The increased fire hazard caused by human occupancy potentially endangers the surrounding forest lands, wildlife, wildlife habitat, water quality, and cultural and historical sites.

24. The location of cabins on the property will inevitably lead to the need for increased police protection to prevent vandalism and to protect residents.

25. The proposal will result in the need for new systems for water, sewage and solid waste disposal.

26. The timber harvested from the restricted lands within the Closed Area is a major source of income for the Yakima Nation. Approximately 90 percent of the annual Tribal income is derived from the timber harvest.

27. The Closed Area is an integral part of the traditional Washat religion practiced by many tribal members in that it provides a unique place to gather foods and herbs.

28. "Sweathouses" and other places or items of cultural or religious significance are located within the Closed Area. At least one traditionally used "sweathouse" location lies within one to two miles of the subject Brendale property.

29. The Yakima Nation is in the process of expending considerable time and money to develop an extensive big game management program within the Closed Area. Field studies are presently underway which preliminarily show that elk herds migrate through the Tepee Creek drainage basin -- the location of the Brendale proposed development.

30. A major elk wintering range lies three to five miles from the Brendale property.

31. Mule deer also use the area in the vicinity of the Brendale property as a migration corridor.

32. There are no permanent residences in the Yakima County portion of the Closed Area.

33. The Closed Area of the Yakima Nation is a unique area. It has remained relatively undeveloped. Over the years its forest has provided considerable

economic benefits to the tribe; its waters, wildlife, and soil have provided an abundance of food and its protected existence has kept intact the Closed Area's intangible but critical cultural values.

34. The preponderance of the evidence has convinced this court that the Closed Area is an integral part of the Yakima Indian Nation. As such, the Tribe must be able to exercise regulatory control over the area, including the Brendale fee land. To deprive the Yakima Nation of this authority would unquestionably threaten its political integrity, its economic security and the general health and welfare of the tribe and its members.

35. Yakima County's interest in regulating the Brendale property is limited; the only interest articulated by the county was the general interest of

providing regulatory functions to its taxpaying citizens. Yakima County does not contend otherwise and the court finds that the Tribe's exercise of its regulatory authority over the fee land will not have effects outside the boundaries of the reservation. In no significant way will the Tribe's regulation of Mr. Brendale's property negatively affect defendant Yakima County.

LEGAL ANALYSIS

The court's legal analysis must focus on two issues: the regulatory jurisdiction question; and, the Yakima Nation's Section 1983 claim.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regu-

late the activities of Mr. Brendale on his Closed Area fee land. If the tribe does indeed have that power, then the inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. Although the two steps are distinct, there is some overlap in the analytical framework.

1. TRIBAL AUTHORITY: The Montana Test.

Although Indian Tribes possess "attributes of sovereignty over both their members and their territory", United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978), the dependent status of tribes and their diminished status as sovereigns limits their power in relations between a Tribe and nonmembers of the Tribe. Id. at 326, 98 S.Ct. at 1087. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdic-

tion over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Similarly, a Tribe's inherent power to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation", New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 611 (1983), apparently that power may be exercised over non-Indian fee lands only in limited circumstances. Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands." Id. at 565, 101 S.Ct. at 1258. Unfortunately, the parameters of that power are anything but settled; neverthe-

less, the Court has provided guidance which is pertinent to the case at hand.

The Montana Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the tribe or its members. Id. at 565, 101 S.Ct. at 1258. Such is not the case here as there is no evidence of any "consensual relationship" between the Yakima Nation and Brendale which would place him within the authority of the Tribe.

The second situation described by the Montana Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." Id. at 566, 101

S.Ct. at 1258. Thus, absent a "consensual relationship", the critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. Id. at 565-66, 101 S.Ct. at 1258-59; see United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (tribe lacked power to regulate water use of non-Indian fee landowners within the reservation); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982); Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to

fee land within the reservation); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), cert. denied, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); Sechrist v. Quinault Indian Nation, 9 I.L.R. 3064 (W.D. Wash. 1982); Lummi Indian Tribes v. Hallover, 9 I.L.R. 3025 (W.D. Wash. 1982).

As stated in the Findings of Fact, this court finds that Brendale's proposed development does indeed pose a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation. His planned development of recreational housing places critical assets of the Closed Area in jeopardy. While the danger to the economically important timber production is significant, of paramount concern to this

court is the threat to the Closed Area's cultural and spiritual values. To allow development in this unique and undeveloped area would drastically diminish those intangible values. That in turn would undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members. This court must conclude therefore that the Yakima Nation may regulate the use that Brendale makes of his fee land within the Reservation's Closed Area.

Notwithstanding the court's finding that the proposed Brendale development's threatened harm allows the Yakima Nation to exercise civil regulatory authority, the defendants argue that Congress has stripped the Tribe of any such power. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of August 15,

1953, 67 Stat. 588, 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[6] The gist of

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6. WASH.REV.CODE § 37.12.010 provides:

> Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:
>
> (1) Compulsory school attendance;
>
> (2) Public assistance;
>
> (3) Domestic relations;

(continued)

their argument is that P.L. 280 was a grant of jurisdiction to the state (and therefore the county) which necessarily must have withdrawn jurisdiction from the Tribe. This argument is without merit for several reasons.

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(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways. Provided further, that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority -- no such grant was necessary. Under P.L. 280, states retain the same regulatory jurisdiction over the on-reservation activities of non-Indians "that they enjoyed prior to that Law". White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981). And it is settled law that long before the enactment of P.L. 280, states (and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. See, e.g., Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); Utah & Northern R.R. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885). As

discussed infra, the only limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", see, e.g., Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) and the doctrine of "federal preemption". See e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's purpose. P.L. 280 was designed to remedy the problem of the lack of state jurisdiction over Indians in their dealings (criminal or civil) with non-Indians. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No

such authorization was needed, however, as to the states' authority over non-Indians. Thus, P.L. 280 was not a grant to the states of jurisdictional powers over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state authority[7] or divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. See Cardin v. De La

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7. Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. See Bryan v. Itasca County, 426 U.S. 373, 384-85, 96 S.Ct. 2102, 2108-09, 48 L.Ed.2d 710 (1976); Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its regulatory bingo laws on the reservation); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (California municipality may not zone restricted lands); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1976) (California county may not zone restricted lands).

Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982); Sechrist v. Quinault Indian Nation, I.L.R. 3064 (W.D. Wash. 1982).[8]

2. YAKIMA COUNTY AUTHORITY: Preemption

Having concluded that the Yakima Nation may exercise its regulatory authority over the Brendale property, the court's inquiry must now focus on whether Yakima County may also exert its authority over the same property, i.e., whether Yakima County may exercise concurrent

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8. Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-Indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. See, Comenout v. Burdman, 84 Wash.2d 192, 525 P.2d 217 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

jurisdiction. While it is unquestioned that Yakima County has the authority to exercise jurisdiction over non-Indian activities on the Reservation, see e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378,. 76 L.Ed.2d 611 (1983); Colville Confederated Tribes v. Walton, 647 F.2d 42, 51-53 (9th Cir. 1981), cert. denied, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981), that power is not boundless. It is limited by the twin barriers of "infringement on tribal sovereignty"[9] and "federal

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9. The "infringement" barrier has as its foundation the right of a tribe to exercise traditional governmental functions. The exercise of state authority may be barred if it "unlawfully infringes 'on the right of Indians to make their own laws and be ruled by them'." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980), quoting Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959).

preemption".[10] Although related in concept, these twin barriers are independent and either standing alone may be sufficient to block the county's attempt to assert its power. White Mountain Apache Tribe v. Bracker, 448 U.S. at 142, 100 S.Ct. at 2582. In other words, Yakima County may extend its regulatory authority onto the Yakima Nation Reservation up to the point where it either infringes on the Tribe's inherent authority or where it is preempted by federal law. In this case, where the county seeks to regulate the activities of non-

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10. The preemption barrier, on the other hand, is based upon the federal supremacy clause and the federal government's plenary power over Indian Tribes. See e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982); Central Machinery Co. v. Arizona Tax Comm'n., 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980).

Indians on fee land, the inquiry must focus on the preemption barrier.[11]

When used in the context of Indian law, the doctrine of preemption is applied uniquely. Due to the "historical origins of tribal sovereignty" and the

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11. Since the infringement barrier is derived from the right of tribal self-government, it is primarily applicable where intratribal relations are implicated. White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1275 (9th Cir. 1981). Yakima County's Regulation of Mr. Brendale's property does not violate the right of tribal self-government. Concurrent jurisdiction over Brendale's property would require him to comply with the regulations of Yakima County and the Yakima Nation. Thus, Yakima County would not be infringing on the Yakima Nation's right to "make their own laws and be ruled by them." See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (state taxation of on-reservation cigarette purchases does not intrude upon or diminish the tribe's authority to also tax); White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1285 (9th Cir. 1981) (state hunting and fishing regulations may be applied to non-Indians on reservations without violating the right of tribal self-government).

federal commitment to tribal self-sufficiency and self-determination it is "treacherous to impart . . . notions of preemption that are properly applied to other contexts." Bracker, 448 U.S. at 143, 100 S.Ct. at 2583. Unlike preemption in other contexts, Indian law preemption does not require "an express congressional statement to that effect," Id. at 144, 100 S.Ct. at 2584, nor does it even require "a narrow focus on congressional intent to preempt state law". New Mexico v. Mescalero Apache Tribe, 103 S.Ct. at 2386. Rather, "state [county] jurisdiction is preempted by federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state [county] interests at stake are sufficient to justify the assertion of state [county] authority." Id. at 2386. In other words, a preemption analysis rests prin-

cipally on a consideration and balancing of the competing federal, county and tribal interests at stake. Id. at 2386.

Federal and tribal interests are assessed from a broad perspective. Traditional notions of Indian sovereignty and the federal government's commitment to the promotion and protection of tribal resources and cultural values are considerations which must be weighed on the preemption scales. E.g., New Mexico v. Mescalero Apache Tribe, 103 S.Ct. at 2386-2387; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982). On the other hand, an assessment of the county's interest is guided by more narrow and specific considerations. The concept of county sovereignty and general county governmental interests are of limited importance. See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n.,

380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). "Yet, a state's [county's] regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state [county] intervention." New Mexico v. Mescalero Apache Tribe, 103 S.Ct. at 2387; Colville Confederated Tribes v. Walton, 647 F.2d at 52-53.

As stated in this court's Findings of Fact, Yakima County's interest in regulating the at-issue Brendale property is minimal. Yakima County conceded that its interest was limited to a general concern of providing regulatory functions to its tax paying citizens. Furthermore, the county did not point to any "off-reservation effects" which the Tribe's regulation of Brendale's property would produce. To the contrary, the county agreed, and this court so finds, that the Tribe's exercise of its regulatory

authority over the fee land will not produce effects outside the Reservation boundary. In sum, the court concludes that Yakima County's interests tip the preemption scales only slightly.

On the other hand, the interests of the Yakima Nation weigh heavily on the preemption scales. The Closed Area provides immense benefit to the Yakima Nation. Its timber produces substantial tribal income; its flora and fauna provide a ready source of subsistence; its sacred areas help sustain the spiritual needs of the tribal members; and its beauty most certainly contributes to the general health and welfare of the Tribe. Those resource and cultural values carry great weight. And, given the unique character of the Closed Area, it is imperative that the Yakima Nation be able to exercise complete control over its use. Accordingly, the court con-

cludes that the interests of the Yakima Nation in exerting its authority over the Brendale property far outweighs the interests of Yakima County; thus, Yakima County is preempted from exercising concurrent jurisdiction and the Yakima Nation's jurisdiction over Brendale's property is exclusive.

B. SECTION 1983 CLAIM:[12]

The bases for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County Commis-

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12. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

sioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Brendale property violated rights enforceable under Section 1983. For the reasons discussed below, the court concludes that neither of these two alleged bases of Section 1983 liability has merit.

Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[13] the court finds that it was not

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13. The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other person within the jurisdiction thereof . . . ." 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since (continued)

denied due process of law by the Yakima County Commissioners. The purpose of the hearings conducted on August 1, 2, 8 and 9, 1983 was to hear the Tribe's appeal of the Planning Department's Declaration of Non-Significance. The hearing was statutorily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement -- which the Tribe succeeded in doing. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the complexity of this lawsuit, and the cases cited in this

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the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws . . . ." Id.

opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue of jurisdiction, particularly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state its objections to the county's jurisdiction over the Brendale property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. See generally Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

While the Tribe's first basis for its Section 1983 claim must fail because no due process deprivation occurred, the Tribe's second ground for relief fails because it involves a "right" which is not within the scope of Section 1983 relief. Based upon this court's conclusion that Yakima County is preempted from exerting its land use authority over the Brendale property, there can be little argument that its attempts to do so were unlawful. It can be said, therefore, that the Yakima Nation has a "right" to be free from such unlawful action. Nevertheless, not all federally created rights are "enforceable" under Section 1983. See generally, Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67

L.Ed.2d 694 (1981); Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

The Tribe's "right" to be free from the county's concurrent jurisdiction is derived from the doctrine of federal preemption. But for the operation of that doctrine, the Yakima Nation would be powerless to interfere with the county's authority. As mentioned previously, the source of preemption as applied in Indian law cases is the federal government's plenary power over Indian Tribes and the Supremacy Clause, U.S. Const. Art. VI, § 2. See e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982); Central Machinery Co. v. Arizona Tax Comm'n., 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980). Of course, "traditional notions of Indian self-government" provide an important "backdrop" which

color the preemption doctrine. McClanahan v. Arizona St. Tax Comm'n., 411 U.S. 164, 172, 93 S.Ct. 1257, 1262, 36 L.Ed.2d 129 (1973).

The Supreme Court has held that a Supremacy Clause violation does not give rise to Section 1983 relief. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 615, 99 S.Ct. 1905, 1914, 60 L.Ed.2d 508 (1979). Mere incompatibility between federal and state (local) laws "does not, in itself, give rise to a claim 'secured by the Constitution.'" Id. The portion of the Civil Rights Act of 1871 now codified as Section 1983 was directed at organized terrorism and the unwillingness or inability of state officials to control the widespread violence. Id. at 610 n. 25, 99 S.Ct. at 1912 n. 25. Thus, Section 1983 is concerned with the relationship between individuals and the state in matters involving life,

liberty or property. It was not intended to apply to the distribution or allocation of power between a state and the federal or tribal government. See id. at 615, 99 S.Ct. at 1914; Consolidated Freightways Corp. of Delaware v. Kassel, 730 F.2d 1139 (8th Cir. 1984) (violation of Federal Commerce Clause does not secure rights within the meaning of Section 1983), cert. denied ___ U.S. ___ 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). In order to be entitled to relief under Section 1983, the Yakima Nation must rely on some enforceable right beyond its Supremacy Clause-derived "right" to preempt conflicting County regulations. Thus, the court concludes that the plaintiff has not stated a Section 1983 claim

and therefore not entitled to attorney's fees under Section 1983.[14]

ATTORNEYS FEES

Based upon the dismissal of the Section 1983 claims against them, defendants Glaspey and Brendale have filed petitions for attorney fees as "prevailing" parties.[15] 42 U.S.C. § 1988. A prevailing defendant in a Section 1983 case may recover attorney fees "only

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14. 42 U.S.C. § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1983, 1985 and 1986 of this title, . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

15. During the trial the court dismissed all of plaintiff's claims against Glaspey. At the conclusion of the trial the court dismissed plaintiff's Section 1983 claim against Brendale, finding that Brendale had not acted "under color" of state law. 42 U.S.C. § 1983.

where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 1937 n.2, 76 L.Ed.2d 40 (1983); Boatowners and Tenants Association v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983). The court finds that none of those prerequisites to fees exists in this case.

There is no contention that plaintiff's Section 1983 claims against these two defendants was vexatious or brought to embarrass them. The defendants do, however, argue that the Section 1983 claims against them were frivolous. Glaspey contends that the action was frivolous as to him because he had no ownership interest in the Brendale property. While the court does agree that the plaintiff should have extensively investigated the surrounding facts to ascertain the identity of the necessary

party defendants, see Fed.R.Civ.P. 11, the court is unable to conclude that the inclusion of Frank Glaspey was frivolous.

Defendant Brendale asserts that the suit against him was frivolous as there was no evidence that he acted "under color" of state law. Notwithstanding the court's dismissal of the Section 1983 claim on those grounds, the plaintiff's claim was not frivolous. The caselaw construing the "under color" of law language demonstrates that the application of that phrase is anything but precise. See e.g. Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983); Fonda v. Gray, 707 F.2d 435 (9th Cir. 1983); Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983); Arnold v. International Business Machines, 637 F.2d 1350 (9th Cir. 1981). The courts' difficulty in establishing definitional parameters has resulted in almost a case-by-case analysis. For that

reason, it was not unreasonable or frivolous for the plaintiff to assert that Brendale was acting "under color" of law when he sought Yakima County approval of his proposed development.

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered in favor of the plaintiff as against all defendants (except Frank Glaspey) to the following extent: The court declares that the Yakima Indian Nation has exclusive regulatory jurisdiction over the land use of the Brendale property described on page 12 of this memorandum opinion.

As to plaintiff's 42 U.S.C. § 1983 claims, judgment shall be entered in favor of defendants Jim Whiteside, Graham Tollefson, Charles Klarech, Richard

Anderwald, Philip Brendale and Frank Glaspey.

Plaintiff's 42 U.S.C. § 1983 claims are DISMISSED WITH PREJUDICE.

All parties shall bear their own attorney fees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

Treaty between the United States
and the Yakima Nation of Indians.
Concluded at Camp Stevens,
Walla-Walla Valley, June 9, 1855
Ratified by the Senate,
March 8, 1859.
Proclaimed by the President
of the United States,
April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE
UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at the Treaty Ground, Camp Stevens, Walla-Walla Valley, on the ninth day of June, in the year one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor, and superintendent of Indian affairs, for the Territory of Washington, on the part of the United States, and the hereinafter named head chief, chiefs, headmen and delegates of the Yakima, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was,

Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederate tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one nation, under the name "Yakama," with Kamaiakun as its Head Chief, on behalf of and acting for said bands and tribes, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouse,

Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the

Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119° 10'), which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same;

thence, in a southesterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White banks," below the Priest's rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide

between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from

those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the

United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to

abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with

the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five

years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two

schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keep-

ing the same in repair and furnished with the necessary tools and fixtures, to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after

the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed

by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between

them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who

drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine..

ARTICLE X. And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam fishery" in which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE XI. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. [L.S.]

KAMAIAKUN,	his x mark	[L.S.]
SKLOOM,	his x mark	[L.S.]
OWHI,	his x mark	[L.S.]
TE-COLE-KUN,	his x mark	[L.S.]
LA-HOOM,	his x mark	[L.S.]
ME-NI-NOCK,	his x mark	[L.S.]
ELIT PALMER,	his x mark	[L.S.]
WISH-OCH-KMPITS,	his x mark	[L.S.]
KOO-LAT-TOOSE,	his x mark	[L.S.]
SHEE-AH-COTTE,	his x mark	[L.S.]
TUCK-QUILLE,	his x mark	[L.S.]
KA-LOO-AS,	his x mark	[L.S.]
SCHA-NOO-A,	his x mark	[L.S.]
SLA-KISH,	his x mark	[L.S.]

Signed and sealed in presence of --
JAMES DOTY, Secretary of Treaties
MIE. CLES. PANDOSY, O.M.T.,
WM. C. McKAY,
W. H. TAPPAN, Sub Indian Agent, W.T.,

C. CHIROUSE, O.M.T.
PATRICK McKENZIE, Interpreter,
A. D. PAMBURN, Interpreter,
JOEL PALMER, Superintendent Indian
Affairs, O.T.,
W. D. BIGLOW,
A. D. PAMBURN, Interpreter.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the

head chief, chiefs, headmen, and delegates of the Yakama, Palouse, and other confederated tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, signed 9th June, 1855.

"Attest: "ASBURY DICKINS, Secretary."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand
[SEAL] eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:

LEWIS CASS, Secretary of State.

The Allotment Act

§ 331. Allotments on reservations; irrigable and nonirrigable lands

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: Provided further, That where a

treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require.

(Feb. 8, 1887, c. 119, § 1, 24 Stat. 388; Feb. 28, 1891, c. 383, § 1, 26 Stat. 794; June 25, 1910, c. 431, § 17, 36 Stat. 859.)

§ 332. Selection of allotments

All allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: Provided, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allot-

ments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

(Feb. 8, 1887, c. 119, § 2, 24 Stat. 388.)

§ 333. Making of allotments by agents

The allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to

be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the Bureau of Land Management.

(Feb. 8, 1887, c. 119, § 3, 24 Stat. 389; June 25, 1910, c. 431, § 9, 36 Stat. 858; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

§ 334. Allotments to Indians not residing on reservations

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this Act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the

manner and with the restrictions as provided in sections 348 and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

(Feb. 8, 1887, c. 119, § 4, 24, Stat. 389; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

§ 339. Tribes excepted from certain provisions

The provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order.

(Feb. 8, 1887, c. 119, § 8, 24, Stat. 391.)

§ 341. Power to grant rights-of-way not affected

Nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

(Feb. 8, 1887, c. 119, § 10, 24 Stat. 391.)

§ 342. Removal of Southern Utes to new reservation

Nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present

reservation in southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

(Feb. 8, 1887, c. 119, § 11, 24 Stat. 391.)

§ 348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his

decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered,

except as herein otherwise provided: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided,

however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null

and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this Act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to

confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the

Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

(Feb. 8, 1887, c. 119, § 5, 24, Stat. 389; Mar. 3, 1901, c. 832, § 9, 31 Stat. 1085; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

§ 349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he

is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extent to any Indians in the former Indian Territory.

(Feb. 8, 1887, c. 119, § 6, 24 Stat. 390; May 8, 1906, c. 2348, 34 Stat. 182.)

§ 354. Lands not liable for debts prior to final patent

No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.

(Feb. 8, 1887, c. 119, as added June 21, 1906, c. 3504, 34 Stat. 327.)

§ 381. Irrigation lands; regulation of use of water

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations

as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

(Feb. 8, 1887, c. 119, § 7, 24 Stat. 390.)